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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL

RONALD LEE ABBOTT, *et al.*
Petitioners,

vs.

A-BEST PRODUCTS COMPANY, *et al.*
Respondents.

On Petition For Writ of Certiorari
To the Supreme Court of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding that state tort law claims against manufacturers of parts or components of railroad locomotives are preempted by Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq*.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners to this consolidated action are thousands of current or former railroad employees who contracted an asbestos related disease after exposure to asbestos throughout the course of their employment.

All of the petitioners were original parties to the following actions: Ronal Lee Abbott, et al., v. A-Best Products, et al., (CA. 00-C-43M, Marshall County, WV); Jasper Abbott, et al., v. McJunkin Corporation, et al., (CA. 01-C-54M, Marshall County, WV), Nancy Aills, et al., v. McJunkin, et al., (CA. 02-C-192K), Marshall County, WV); Lawrence O'Neil Andrews, et al., v. McJunkin Corporation, et al., (CA. 02-C-132K, Marshall County, WV); Robert W. Fonner, et al., v. A-Best Products Company, et al., (CA 01-C-212, Brooke County, WV); Billy Joe Lemley, et al., v. Owen-Corming Corp., et al.,(CA. 96-C-216K, Marshall County, WV); Allen Adkins, et al., v. Anchor Packing Co., et al., (CA. 98-CV-428, Marshall County, WV); Charles R. Abbott, et al., v. American Standard, Inc., et al., (CA. 02-C-742-2, Harrison County, WV); Allen Adkins, et al., v. General Motors Corporation, et al., (CA. 02-C-73K, Marshall County, WV); Ralph Aills, et al., v. General Motors Corporation, et al., (CA. 02-C-192K, Marshall County, WV); Lawrence Andrews, et al., v. General Motors Corporation (CA. 02-C-132K, Kanawha County, WV).

The respondents are three manufacturers of railroad locomotives or locomotive parts: Old Orchard Industrial Corporation, Viad Corporation, and General Motor Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW viii

JURISDICTION ix

STATUTORY PROVISIONS INVOLVED x

STATEMENT OF THE CASE 1

I. COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED 3

A. THE WEST VIRGINIA SUPREME COURT'S DECISION DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 3

1. THIS COURT'S PRIOR HOLDINGS ESTABLISH THAT THE LBIA OCCUPIES THE FIELD OF SAFETY STANDARDS FOR LOCOMOTIVES BUT DOES NOT OTHERWISE INFRINGE UPON A PLAINTIFF'S RIGHT TO RECOVER 4

2. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS CLAIMS AGAINST MANUFACTURERS 8

3. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS CLAIMS INVOLVING LOCOMOTIVES THAT ARE NOT IN USE 16

B. THE WEST VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT AND OF A UNITED STATES COURT OF APPEALS 18

II. CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Adkins v. Illinois Central Railroad Company
326 F.3d 828 (7th Cir. 2003)..... 18, 19

Angell v. Chesapeake & Ohio Ry. Co.
618 F.2d 260 (4th Cir. 1980)..... 16, 17

Atlantic Coast Line R. Co. v. Georgia
234 U.S. 280 (1914)..... 10

Cipollone v. Liggett Group, Inc.
505 U.S. 504, 516 (1992)..... 9

CSX Transp. Inc. v. Easterwood
507 U.S. 658, 663 (1993)..... 8, 9

Deans v. CSX Transportation, Inc.
152 F.3d 326 (4th Cir. 1998)..... 16, 17

De Canis v. Bica
424 U.S. 351 (1976)..... 9

English v. General Electric Co.
496 U.S. 72, 85-86 (1990) 6, 8, 9, 14

Engvall v. Soo Line R.R. Co.
632 N.W.2d 560 (Minn. 2001)..... 15, 18, 19

Estes v. Southern Pacific Transportation Co.
98 F.2d 1195 (10th Cir. 1979)..... 17

Fontaine v. National Railroad Passenger Corp.
54 Cal.App.4th 1519 (Cal. App. 3 Dist. 1997) 4

Forrester v. American Diesel Electric
255 F.3d 1205 (9th Cir. 2000)..... 6, 13, 15

Gilvary v. Cuyahoga Valley Ry. Co.
292 U.S. 57 (1934).....3, 5, 19

In re TMI Litigation Cases Consol. II
940 F.2d 832 (3rd Cir. 1991).....11

In re West Virginia Asbestos Litigation
592 S.E.2d 818 (W.Va. 2003).....2, 3, 16, 18, 19

Jones v. Rath Packing Co.
430 U.S. 519, 525 (1977).....9, 10

Kernan v. American Dredging Co.
355 U.S. 426 (1958).....4

Laughlin v. Lofton
62 So.2d 745 (Fla. 1953).....4

Law v. General Motors Corporation
114 F.3d 908 (9th Cir. 1997).....6, 13, 14, 15

Lorincie v. Southeastern PATransp. Authority
34 F.Supp.2d 929, 931 (E.D. Pa. 1998).....9, 11, 12, 13

Moore v. Chesapeake & O.Ry. Co.
291 U.S. 205 (1934).....3, 4, 5, 6, 19

Napier v. Atlantic Coast Line Railroad
22 U.S. 605 (1926).....5, 11

Norfolk & Western v. Ayers
538 U.S. 135, 162-63 (2003).....15

Pacific Gas & Electric Co. v. State Energy Resources
Conserve & Develop. Commission, 461 U.S. 190 (1983).....7

Phillips v. CSX Transportation, Inc.
190 F.3d 285, 288 n.2 (4th Cir. 1999).....17

Pinkham v. Maine Cent. R.R. Co.
874 F.2d 875, 882 (1st Cir. 1989).....17

Rice v. Santa Fe Elevator Corp.
331 U.S. 218, 230 (1947) 10

Scheiding v. General [illegible]rs Corporation
22 Cal.4th 471, 993 P.2[illegible]6 (2000) 6, 13

Schneidewind v. ANR Pipeline Co.
485 U.S. 293, 299 (1988) 8

Silkwood v. Kerr-McGee Corp.
464 U.S. 238 (1984) 3, 6, 7, 9, 19

Southern Ry. Co. v. Lunsford
297 U.S. 398, 402 (1936) 18

Steer v. Burlington Northern
720 F.2d 975 (8th Cir. 1983) 17

Texas & Pacific R.R. Co. v. Rigsby
241 U.S. 33, 39-40 (1916) 4, 6

Trinidad v. Southern Pacific Transportation Co.
949 F.2d 187 (5th Cir. 1991) 16

Urie v. Thompson, 176 S.W.2d 471 (Mo. 1943) 4

Varney v. Norfolk & Western Ry. Co.
899 F.Supp. 280, 282 (S.D. W.V. 1995) 18

STATUTES AND RULES

Atomic Energy Act, 42 U.S.C. § 2011 *et. seq.* 7

Federal Employers Liability Act, 45 U.S.C. §51, *et. seq.* 4

Federal Railway Safety Act, 49 U.S.C. §20106, *et. seq.* 1, 2

Federal Safety Appliance Act, 49 U.S.C. § 20301 *et seq.* ... 1, 4

Locomotive Boiler Inspection Act
49 U.S.C. § 20701 *et seq.* ..... i, x, 1, 3, 16

OPINIONS BELOW

The Trial Court Orders granting Summary Judgment are non-reported opinions and have been attached at Appendix A.

The Order Denying the Petition for Appeal is a non-reported opinion and has been attached at Appendix B.

JURISDICTION

The Order denying the petition for appeal was entered on March 15, 2006. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, are reproduced at Appendix C.

STATEMENT OF THE CASE

The Petitioners herein respectfully Petition for a Writ of Certiorari to review the judgment of the Trial Court, as directed by the answer to a certified question from the West Virginia Supreme Court. This Statement is based on the facts as presented to the Honorable Arthur M. Recht, the Trial Court judge, and on which his decision was based.

Petitioners in this consolidated action are current and former railroad employees who contracted an asbestos-related disease process after exposure to asbestos throughout the course of their employment. They initially filed Complaints, seeking damages for these asbestos-related diseases, against manufacturers and distributors of asbestos-containing locomotives or locomotive parts; including the Respondents in this action.

The Respondents, in early 2002, had previously filed Motions for Summary Judgment arguing that the claims of the petitioners were preempted by the Locomotive Boiler Inspection Act (LBIA) or (BIA), 49 U.S.C. § 20701 *et seq.*, the Federal Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.*, and the Federal Railway Safety Act (FRSA), 49 U.S.C. § 20106 *et seq.*

The Circuit Court of Kanawha County, West Virginia, by and through The Honorable Martin J. Gaughan, in July of 2002, denied the Motions for Summary Judgment, but certified certain questions to the West Virginia Supreme Court:

> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Locomotive Boiler Inspection Act 49 U.S.C. § 20701 *et seq.*?
>
> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Federal Safety Appliance Act 49 U.S.C. § 20301 *et seq.*?
>
> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by

federal law under the Federal Railway Safety Act, 49 U.S.C. § 20106 *et seq.*?

The West Virginia Supreme Court answered the first question in the affirmative. See In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003). The West Virginia Supreme Court either failed or declined to answer the second two questions. The aforesaid Petitioners were not able to seek a Writ of Certiorari to the United States Supreme Court at that particular time since a Final Order was not issued; as the West Virginia Supreme Court only answered a certified question.

This decision prompted several defendants, namely Viad Corp, General Motors Corp., and Old Orchard Corporation to renew their Motions for Summary Judgment. The Trial Court granted these motions in reliance on In re: West Virginia Asbestos Litigation, in May of 2005.

The West Virginia Supreme Court of Appeals, on March 15, 2006, denied a Petition for Appeal filed by the Petitioners. The Petitioners now respectfully request that their Petition for a Writ of Certiorari be granted due to the wide and sweeping impact the decision has on thousands of claims.

I. COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED

A. THE WEST VIRGINIA SUPREME COURT'S DECISION DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The West Virginia Supreme Court's decision in In re West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003), directly conflicts with this Court's holdings regarding the scope of preemption under the LBIA and SAA in Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205 (1934) and Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), as well as the nature and effect of federal preemption generally, as explained and developed in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) and subsequent cases.

Specifically, the Petitioners' common law claims against the manufacturers and suppliers of locomotive parts and appurtenances are not preempted by the Locomotive Boiler Inspection Act (LBIA), 49 U.S.C. § 20701 *et seq.*, because this Act merely establishes the standard with which the manufacturers and suppliers need to conform, rather than insulating them from liability for manufacturing and/or supplying asbestos containing parts.

Furthermore, the Petitioners' claims are not preempted because the LBIA does not apply to manufacturers or suppliers. Actions against manufacturers do not fall within the scope of the field occupied by the Act and thus are only preempted if they actually conflict with or frustrate the goals of the federal scheme. Since these actions do not conflict with or frustrate the goals of the Act, preemption does not lie.

Finally, the common law claims of the Petitioners are not preempted by the LBIA since much of the Petitioners' exposure to the asbestos containing products occurred while the locomotives and railcars at issue were not "in use." Since locomotives and railcars not "in use" do not fall within the preemptive scope of the

Act, the common law causes of action can only be preempted to the extent that they conflict with or frustrate the purpose of the federal scheme.

1. THIS COURT'S PRIOR HOLDINGS ESTABLISH THAT THE LBIA OCCUPIES THE FIELD OF SAFETY STANDARDS FOR LOCOMOTIVES, BUT DOES NOT OTHERWISE INFRINGE UPON A PLAINTIFF'S RIGHT TO RECOVER

Any analysis regarding the scope of federal preemption under the LBIA must necessarily begin with a discussion of the history of this statute. What is commonly referred to as the Locomotive Boiler Inspection Act, is actually part of, or an amendment to, the earlier Federal Safety Appliance Act, 49 U.S.C. § 20301 *et seq.*, See Urie v. Thompson, 176 S.W.2d 471 (Mo. 1943); Laughlin v. Lofton, 62 So.2d 745 (Fla. 1953); Fontaine v. National Railroad Passenger Corp., 54 Cal.App.4th 1519 (Cal. App. 3 Dist. 1997).[1] Although both the LBIA and the SAA are to be read *in pari material* with the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.*, it is important to note that the first SAA was enacted in 1893, fifteen (15) years before the current version of the FELA even existed. See Kernan v. American Dredging Co., 355 U.S. 426 (1958).

Since the SAA did not provide its own cause of action, any cause of action brought pursuant to that Act had to be brought at common law, or pursuant to some other applicable statute. As the United States Supreme Court has held on numerous occasions, the SAA merely prescribed the duty, or set the standard, in the field of railcar safety. See Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205, 215 (1934)("The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee though the breach of the duty sprang from the principle of common law."); See also, Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916). Elaborating further, the Moore

[1] While currently codified separate from one another, because what is now referred to as the LBIA was actually an amendment to the SAA, this Court's decisions interpreting the preemptive scope of the SAA are highly relevant if not equally applicable to any analysis under the LBIA.

Court explained, "The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights." Moore, 291 U.S. at 215. Thus, at least at the time of the SAA's original enactment, it can be safely assumed that Congress did not intend to preempt any common law rights belonging to injured employees, since those common law rights were the only vehicle in place that allowed potential plaintiffs to enforce the federal standards they had created.

This Court expanded even further on its Moore decision later that same year in the case of Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), a case which should, for all intents and purposes, resolve the question of whether the SAA and LBIA preempt common law tort causes of action. In Gilvary, a railroad employee injured in the furtherance of intrastate (not interstate) commerce attempted to bring a personal injury action against his railroad employer under the laws of Ohio, despite an agreement between the parties to be bound by the Ohio worker's compensation laws. The railroad objected to the action, arguing that the action should be resolved within the worker's compensation system, and the employee countered that the SAA prevented (or preempted) the application of worker's compensation law. Thus, the question as properly before this Court was whether the SAA itself serves to preempt the application of state worker's compensation laws for a violation of SAA standards. In holding that the SAA does not prevent the application of worker's compensation laws, the Supreme Court engaged in a detailed discussion of the SAA's purposes and objectives. In so doing, it held unequivocally that the SAA, which also incorporates the LBIA, serves merely to establish a federal standard for safety, and does not in any way effect the manner in which an employee seeks compensation for a violation of those standards. As declared by the Court, "These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from a breach." Id. At 61-62. The Gilvary decision was decided after, and in fact cites to, this Court's earlier decision in Napier v. Atlantic Coast Line Railroad, 22 U.S. 605 (1926)[2], the keystone case relied upon by all

[2] For a more detailed discussion of Napier, see *infra*, p. 10.

of the courts that have held that the LBIA preempts common law tort claims against manufacturers and suppliers. (See *e.g.* Law v. General Motors Corporation, 114 F.3d 908 (9th Cir. 1997), Forrester v. American Diesel Electric, 255 F.3d 1205 (9th Cir. 2000), Scheiding v. General Motors Corporation, 22 Cal.4th 471, 993 P.2d 996 (2000)).

Taken as a whole, the United States Supreme Court's decisions in Napier, Moore and Gilvary clearly define the scope of preemption under the LBIA and SAA. These statutes were intended to prescribe the standard (or duty, so to speak) to keep railroad locomotives and railcars safe for workers and travelers, and any state efforts to modify, enlarge or even duplicate these standards are absolutely preempted under the Supremacy Clause. However, these cases are also equally clear that the scope of the preemption is limited to the establishment of standards, and does not foreclose actions for compensation for injury suffered by railroaders and passengers. Thus, common law or statutory rights to recovery possessed by an injured worker are still viable to the extent they do not seek to impose a standard different from, or which in any manner conflicts with, the standards established by Congress through the LBIA and the SAA.

Even if this Court had not already specifically limited the preemptive scope of the LBIA and SAA in Moore, Rigsby and Gilvary, the general preemption principles developed by this Court would dictate that the Petitioners' claims are not preempted. In the last few decades this Court has developed an approach for deciding when state tort law causes of action fall within a preempted field. This approach involves a determination of whether "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). This concept evolved into the more bright line determination of whether the state tort causes of action have "some direct and substantial effect" upon the focus of the federal regulatory scheme. English v. General Electric Co., 496 U.S. 72, 85-86 (1990)(relying upon Silkwood).

In Silkwood, this Court was asked to determine whether a punitive damages award on the plaintiff's common law claim for radiation poisoning was preempted by the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et. seq*. Three years earlier, in the case of Pacific Gas & Electric Co. v. State Energy Resources Conserve & Develop. Commission, 461 U.S. 190 (1983), this Court had already determined that Congress had intended the AEA to occupy the field of atomic safety. However, in according to this Court, this intent to occupy the field did not necessarily require the preemption of the plaintiff's claims. The Court decreed that the parameters of the preempted field:

> [S]hould not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law.

Silkwood, 464 U.S. at 256. After analyzing the nature of the plaintiff's claims, this Court held that they were not preempted by federal law since the prosecution of the actions did not interfere with the standard of care established by the Act, or otherwise frustrate its objectives. Id., at 248-58. In many respects, the Silkwood decision is remarkably analogous to the situation which is currently before this Court. Under Napier, which the Respondents will surely argue stands for the proposition the Congress intended to preempt the field of locomotive safety, a court must still scrutinize the individual nature of the claims at issue to determine whether or not they frustrate the federal objective and fall within the preempted field. Much like the instant matter, the AEA was held to preempt the field with respect to the applicable standard of care, but not to preclude common law tort causes of action which do not conflict with or frustrate the controlling federal standards.

Simply put, the use of asbestos-containing products on railroad locomotives can be itself a violation of the LBIA, and it is undeniable that state courts have the authority to so decide, and they have done so regularly in FELA actions over the last three to

four decades. Thus, allowing state law tort causes of action to proceed against manufacturers for using asbestos in their products poses no risk to interstate commerce because it does not impose a standard that conflicts with the LBIA. To the contrary it is merely another enforcement mechanism, since the statute itself does not provide for direct causes of action. In short, the LBIA and SAA create the federal standard – which is supreme above all others – but the enforcement of these standards in tort causes of action is left to the existing remedies, namely the FELA in some circumstances, and common law tort causes of action in others.

2. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS CLAIMS AGAINST MANUFACTURERS

Federal preemption of state regulation comes in three different forms: first, express preemption, where Congress specifies preemption in the text of a particular act; second, field preemption, where federal regulation is so pervasive that one may reasonably infer that Congress intended to dominate the field and preclude state laws; and finally, conflict preemption, where federal and state law actually conflict, and a private party cannot possibly comply with both requirements. English v. General Electric Co., 496 U.S. 72, 78-79 (1990). In the presence of any of these three forms of preemption, state regulation must yield to the supremacy of federal law. See CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 663 (1993).

Preemption is fundamentally a question of congressional intent. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988). When Congress has made its intent known through explicit statutory language, "the court's task is an easy one." English 496 U.S. at 79. However, the LBIA is devoid of any express statutory language on the subject of preemption, so any claims of preemption with regard to the LBIA must rest on one of the other two forms; field preemption or conflict preemption. In holding that the Petitioners' claims in this case are preempted, the West Virginia Supreme Court relied upon the doctrine of field preemption.

Field preemption operates to preempt state law where the state regulation in question regulates conduct in a field that Congress intended the federal government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the state to supplant it, or where an act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject. English, 496 U.S. at 79. Although state common law tort actions may sometimes rise to the level of preempted regulation, whether or not they fall within the scope of a preempted field is ultimately a matter of Congressional intent. Silkwood., 464 U.S. 238, 256 (1984). In recent decisions, this Court has developed an approach for deciding when state tort law causes of action fall within a preempted field which involves a determination of whether "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." Id. This concept evolved into the more bright-line determination of whether the state tort causes of action have "some direct and substantial effect" upon the focus of the federal regulatory scheme. English, 496 U.S. at 85-86 (relying upon Silkwood).

The burden of establishing congressional intent to preempt state regulation rests upon the party claiming preemption. De Canis v. Bica, 424 U.S. 351 (1976). Because the state regulation at issue in this case involves a state's historic police powers to regulate health and safety within its borders, the Respondents must overcome significant precedential obstacles. First and foremost, any court considering a preemption claim should "start with the assumption that the historic police powers of the States [are] not to be superseded" unless Congress has indicated that preemption is its "clear and manifest purpose." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Going even further, "such an assumption should reach the level of a strong presumption where the federal law is directed at subjects 'traditionally governed' by states, such as health and safety." Lorincie v. Southeastern Pennsylvania Transportation Authority, 34 F.Supp.2d 929, 931 (E.D. Pa. 1998), citing Easterwood, 507 U.S. at 664. As stated by the United States Supreme Court in Jones v. Rath Packing Co., 430

U.S. 519, 525 (1977), "[w]here ... the field which Congress is said to have preempted" includes areas that have "been traditionally occupied by the states," Congressional intent to supersede state laws must be "clear and manifest." Jones 430 U.S. at 525, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The original LBIA became law in 1911. Through this Act, Congress conferred upon the Interstate Commerce Commission the power to regulate with respect to locomotive equipment. The original Act applied only to locomotive boilers, and it stated that it was, "[a]n act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

It has been determined that this original version of the Act did not evidence any intent by Congress to completely occupy the field of locomotive safety. See Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280 (1914). However, in 1915 the Act was amended and the provisions were extended to include "the entire locomotive and tender and all parts and appurtenances thereof." In 1924, Section 2 of the original Act was amended to read:

> That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the action service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. § 2 (1924). It is critical that this provision specifically mentions railroad carriers, but makes no mention of manufacturers.

Following the amendments to the LBIA, this Court had the opportunity to reconsider the preemptive effect of the LBIA in the case of Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926). In Napier this Court was asked to determine whether or not a Georgia regulation requiring automatic fire doors and cab curtains on locomotives was preempted by the LBIA. Considering the language of the recent amendments, this Court declared that unlike the focused requirements of the Safety Appliance Act (SAA), the power delegated to the Interstate Commerce Commission (ICC) by the Amended Locomotive Boiler Inspection Act was general and intended to occupy the field of locomotive safety. Napier 272 U.S. at 611. The Napier Court held that the preemptive effect of the LBIA precluded any state regulation in "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." Napier 272 U.S. at 611.

Although the Napier Court answered the question of whether Congress intended the LBIA to completely occupy the field, it left unanswered many questions involving the scope and nature of the field so preempted. After the determination is reached that Congress intended a piece of federal legislation to occupy an entire field, the next question which a court must ask is what is the scope or definition of the field. See *In re* TMI Litigation Cases Consol. II, 940 F.2d 832 (3rd Cir. 1991). In Napier, this Court was being asked to determine whether the LBIA preempted state laws which prohibited use within the state of locomotives not equipped with automatic fire doors and cab curtains. In the instant matter, this Court is being asked to consider whether or not the LBIA preempts common law tort actions against the manufacturers of locomotive parts or locomotives themselves for inherent defects, and if so, under what circumstances. Thus, the Respondents must still overcome the "strong presumption" that the causes of action brought by the Petitioners are not within the scope of the field that the federal government occupies, and they must further demonstrate that Congress's intent to preempt such claims was "clear and manifest."

Any analysis of Congressional intent must begin with the statutes in question, and as noted by the U.S. District Court for the Eastern District of Pennsylvania in the case of Lorincie v. Southeastern Pennsylvania Transportation Authority, 34 F.Supp.2d

929, 933, (E.D.Pa. 1998), which dealt with the preemptive effect of the LBIA, the LBIA on its face applies simply to "railroad carriers." Similar to the case at bar, Lorincie involved a railroad employee who filed suit against a manufacturer of locomotive parts, alleging that he was harmed by a defect in the product (a seat), and as in the instant matter, the manufacturer raised the issue of preemption. In analyzing the issue, the Lorincie court gave weight to the fact that the phrase "railroad carrier" (or its shorter form, "carrier") appears almost two dozen times in the few pages that the Act takes up in the U.S. Code, while there is no mention whatsoever of the phrase "manufacturer." Lorincie, 34 F.Supp. 2d at 933. The court stated, "[t]hus it appears from the text that even if Congress intended the BIA to preempt state common law claims against carriers (itself a contested point), it did not intend to preempt state common law claims against manufacturers..." Lorincie, 34 F.Supp. 2d at 933.

According to Lorincie, the structure of the Act also supports the conclusion that the LBIA was not intended to preempt common law claims against manufacturers. Among other things, the LBIA establishes the following standards with respect to railway safety relative to locomotives:

> It requires the Secretary to inspect locomotives used by carriers and ensure that carriers make their own inspections; establishes guidelines for noncompliance with the broad railroad safety standards; mandates the issuing by carriers of inspection and repair reports; requires carriers to report accidents and orders the Secretary to investigate the report on those accidents; permits the Secretary to publish investigative reports; requires carriers to file monthly accident reports; provides the Secretary with general investigative power and the authority to publish investigative reports; and precludes the use in civil actions of investigative reports made by a carrier or the Secretary.

Lorincie, 34 F.Supp 2d. at 933.

As pointed out in Lorincie, "it is clear that the BIA as a whole establishes a regulatory framework within which carriers and the

Secretary of Transportation – but not railroad manufacturers – operate." Lorincie, 34 F.Supp. 2d at 934. The court further adds, "[n]othing about the structure of the BIA indicates that Congress intended to bring railroad manufacturers within its regulatory web, let alone to preclude state common law actions against railroad manufacturers." Lorincie, 34 F.Supp. 2d at 934.

In conclusion the Lorincie court said of the LBIA, "[t]he Statute's text does not mention railroad manufacturers, its structure does not invite reading them into it, and federalism and history counsel leaving them out." Lorincie, 34 F.Supp. 2d at 934. In essence, the court found that given the requirement that Congress's intent to preempt state police powers be "clear and manifest," and the strong presumption against preemption in the area of health and safety, it would not broadly stretch the preemption umbrella of the LBIA to cover actions against a group of entities that are not even mentioned (or arguably envisioned) in the statute.

The Lorincie court's interpretation of the scope of the field preempted by the LBIA is in keeping with the plain language of the LBIA. It makes no logical sense to attempt to read into statutes words that are not there, and the Lorincie court's holding stays true to the proposition that the field that is preempted should be narrowly defined.

In concluding that common law claims against manufacturers are preempted, the West Virginia Supreme Court relied upon a string of cases including, Law v. General Motors Corporation, 114 F.3d 908 (9th Cir. 1997), Forrester v. American Diesel Electric, 255 F.3d 1205 (9th Cir. 2000), Scheiding v. General Motors Corporation, 22 Cal.4th 471, 993 P.2d 996 (2000), and others. However, like a string of dominos, these cases all rely upon a misapplication of federal preemption law first espoused in Law. Much like the case at bar, Law involved injured railroad employees seeking to recover from locomotive part manufacturers through state common law tort claims. In holding that these claims were preempted by the LBIA, the court focused on what it saw as one of the underlying purposes of the LBIA, uniform federal railroad regulation. Law at 911 – 12. The Law court stated, "If each state were to adopt differing liability triggering standards, manufacturers would have to sell locomotives and cars whose

equipment could be changed as they crossed state lines..." later adding, "This would transfer the regulatory locus from the Secretary of Transportation to the state courts..." Law at 911-12. The court was correct in its speculation that allowing state court claims against manufacturers could conflict with the established federal law and could also frustrate interstate commerce. However, it incorrectly applied federal preemption law and reached an unjust and incorrect result.

As already discussed, black letter preemption law requires that there be a "strong presumption" against preempting state laws in the traditional police power areas of health and safety, and that Congress's intent to do so must be "clear and manifest." However, the Law court went beyond these guidelines when it focused on the possible effect of state regulation of part manufacturers on the federal goals affected by the LBIA. It is certainly true that if the LBIA did not have any preemptive effect on state regulation of manufactures, a locomotive part manufacturer could be placed in the unique position of being held liable in state court under the theory of products liability for including a component part which was required by the LBIA. However, the analysis of such preemptive effect in this type of scenario does not properly belong to the doctrine of field preemption, instead the analysis should be made under the built-in checks and balances provided for under conflict preemption. As mentioned above, conflict preemption occurs when federal and state laws actually conflict, and a private party cannot possible comply with both requirements. English v. General Electric Co. at 78-79. Thus, when a state regulation conflicts with the federal standards clearly directed at railroad carriers such that a private party is unable to comply with both, the state regulation must yield to the supremacy of the federal regulation under the doctrine of conflict preemption. However, in situations such as the present case, when the federal regulation clearly directed at railroad carriers and the state regulation allowing common law tort recovery against manufacturers are not in direct conflict, then preemption does not occur.

Law further states that preemption was justified because the plaintiffs had another avenue available to them, in that they were railroaders and therefore they could recover in actions against their employer under the FELA. Law at 912. However, this argument

ignores a number of factual scenarios in which a plaintiff will not have any other avenue of recovery available to him. One of these scenarios, which has actually arisen in the past, is the scenario in which the injured plaintiff is not a railroad worker and the only person against whom he can recover is the manufacturer of the locomotive part. This was the scenario presented in Forrester v. American Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001). In Forrester, a non-railroad employee was injured when a locomotive crane operated by his employer dragged a large metal beam across his leg. Forrester's employer was not a "common carrier by rail", and therefore no FELA action was available to him, instead he was forced to pursue a product's liability action against the manufacturer of the crane. The court held that the LBIA was applicable to the locomotive crane in question, and therefore under Law the claim was preempted by the Act. Forrester at 1207-10. The Forrester Court seemingly laments its decision to preclude recovery, but found no reason to restrict the preemptive force of the Act. Forrester at 1210.

Yet another affect of the Law and Forrester analysis is the preclusion of contribution and indemnification claims by the common carriers against the manufacturers who subjected them to liability in the first place. Nowhere in the body of the LBIA, or in the legislative history, can there be found even the slightest evidence to establish that it was the "clear and manifest" intent of Congress to preclude "common carriers" from filing contribution claims against manufacturers subjecting them to liability to their employees under the LBIA and the FELA. Although there are no decisions from this Court directly addressing the issue of a railroad's ability to obtain indemnification from a manufacturer or supplier for liability it sustained under the LBIA, this Court did address the issue of indemnification for FELA liability generally in the case of Norfolk & Western v. Ayers, 538 U.S. 135, 162-63 (2003). It is important to note that Ayers specifically mentions the case of Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001)(discussed later) as standing for the proposition that railroads may seek indemnification from manufacturers and suppliers, and the Engvall case specifically dealt with the issue of a railroad's liability under the LBIA. If, as the Ayers case suggests, a railroad is able to seek indemnification from a manufacturer or supplier for

its LBIA liability, it logically follows that an injured railroader should be able to pursue such an action directly.

The West Virginia Supreme Court acknowledged that this Court has "narrowed the scope of federal preemption in several recent cases," but still concluded that it must find preemption because of the "voluminous foreign precedent on this specific question." *In re* West Virginia Asbestos Litigation, 592 S.E.2 at 824 n. 4. However, the recent decisions of this Court are clear, and all of the wrongfully decided "foreign precedent" to the contrary does not that change the fact that the Petitioners' claims should not be preempted because they do not conflict with or frustrate the federal scheme at issue. For this reason, this Petition should be granted.

3. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS LOCOMOTIVES THAT ARE NOT IN USE

It is axiomatic that if a federal scheme does in some manner act to allow "field preemption", lawsuits arising from situations that are outside of "the field" can not be preempted. This is of critical importance in discussing preemption issues pursuant to the LBIA, because by its very terms, the Act only applies when a railcar or locomotive is in "use or allowed to be used." 49 U.S.C.A. § 20701(LBIA), See also, Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980). In other words, if the LBIA has any preemptive affect whatsoever, the field preempted does not include situations where locomotives or railcars are not "in use."

What constitutes "in use" has been the subject of much debate by the courts which have considered this issue, and they have responded by announcing various tests. For example, the 5th Circuit Court of Appeals, in Trinidad v. Southern Pacific Transportation Co., 949 F.2d 187 (5th Cir. 1991), a Safety Appliance Act (SAA) case, held that a train in the process of being prepared for departure is not in use until it has been assembled and all pre-departure inspections have been completed. Trinidad, 949 F.2d. at 189. However, the 4th Circuit has proposed a type of "totality of the circumstances" test in determining whether or not a train is in use. In Deans v. CSX Transportation, Inc., 152 F.3d 326

(4th Cir. 1998), an SAA case, the court held that "to determine whether a train is 'in use' for purposes of the FSAA, the primary factors to be considered are where the train was located at the time of the accident and the activity of the injured party." Deans, 152 F.3d. 329 (citing Pinkham v. Maine Cent. R.R. Co., 874 F.2d 875, 882 (1st Cir. 1989)). This same logic has been held to apply in LBIA cases as well. "[B]ecause the 'in use' language in the Boiler Inspection Act is identical to the language in the FSAA, courts have applied case law interpreting the Boiler Inspection Act to the FSAA as well." Phillips v. CSX Transportation, Inc., 190 F.3d 285, 288 n.2 (4th Cir. 1999). In fact, in Pinkham, a BIA case relied upon by Deans, the Pinkham court held the "determinative factors" in the application of the BIA are "the location of the locomotive at the time of the injury and the activity of the injured party," Pinkham, 874 F.2d at 882, the exact factors relied upon by the Deans court in evaluating "in use" under the SAA.

Regardless of what standard is used in evaluating whether locomotives that are being serviced or repaired are considered to be "in use", for purposes of the LBIA, Pinkham, 874 F.2d at 881 (LBIA case); Steer v. Burlington Northern, 720 F.2d 975 (8th Cir. 1983) (pipefitter injured while repairing a locomotive that could not move was not within the ambit of the BIA); Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979) (Employee injured while locomotive in roundhouse not covered by BIA) (citing other cases), the reason for the "in use" distinction is clear. "The purpose of the 'in use' limitation is to give railcar operators [or locomotive operators] the opportunity to inspect for and correct safety appliance defects before the FSAA [or LBIA] exposes the operators to strict liability for such defects." See Angell, 618 F.2d at 262.

Many of the Petitioners herein were exposed, at least in part, to the Respondents' asbestos-containing products during the course of their employment while locomotives and/or rail cars were not in use. For example, Petitioners whose crafts concern primarily rail car and/or locomotive car repair (*i.e.* carman, car inspector, pipefitter, electrician, laborer, helper, equipment repairman, sheetmetal worker, mechanic, boilermaker, *etc.*) would have been exposed to asbestos primarily (if not exclusively) while repairing trains on shop tracks, roundhouses, or repair facilities. Petitioners

may have also come into contact with products manufactured by Respondents when those products were not on trains or rail cars at all. See Southern Ry. Co. v. Lunsford, 297 U.S. 398, 402 (1936) ("Whatever in fact is an integral or essential part of *completed* locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute [LBIA]. (Emphasis added)). Varney v. Norfolk & Western Ry. Co., 899 F.Supp. 280, 282 (S.D. W.V. 1995) (As a matter of law when a part is detached from a locomotive, it is no longer considered an appurtenance of that locomotive for LBIA purposes). During those times, the LBIA does not apply, and accordingly can have no preemptive effect. Because the decision below ignored this important distinction, this Petition should be granted.

B. THE WEST VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT, AND OF A UNITED STATES COURT OF APPEALS

The decision of the West Virginia Supreme Court in In re West Virginia Asbestos Litigation directly conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in Adkins v. Illinois Central Railroad Company, 326 F.3d 828 (7th Cir. 2003) and the decision of the Supreme Court for the State of Minnesota in Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001). Although there are of a number of other state and federal decisions in accord with In re West Virginia Asbestos Litigation, these decisions just further illustrate the necessity of having this Court resolve this matter once and for all.

In Adkins, a group of injured train passengers brought suit against multiple defendants, including a locomotive manufacturer, asserting the common law claims of negligence and strict liability. The defendants attempted to remove the case to federal court under the doctrine of "complete preemption," arguing that Congress has intended to include such claims within the preempted field of the LBIA. Id. at 830. The court rejected the defendants' arguments, stating "[w]e see nothing in the Locomotive Inspection Act to indicate that Congress clearly intended completely to replace state law with federal law ... That is what would be required to create

'complete' or 'field' preemption, as opposed to the more routine conflict preemption." Id., at 835. The court noted however, that just because the plaintiffs' claims did not fall within the scope of a preempted field did not mean that they were not preempted, adding "ordinary conflict preemption may well exist with respect to some or all of the claims." Id. Although the discussion of preemption principles in Adkins is limited, it can be assumed that the court was not implying that Congress did not intend to occupy the field of locomotive safety standards, but rather that the plaintiffs' common law tort causes of action fall outside of the scope of this preemptive field, and are thus governed by the principles of conflict preemption rather than field preemption. In this manner, the reasoning of the 7th Circuit is in perfect accord with this Court's decisions in Gilvary and Moore, and the more general preemption analysis developed in Silkwood.

In Engvall, an injured locomotive engineer brought an FELA action against his "common carrier" employer, who in turn sought contribution against an equipment manufacturer for violations of the LBIA. The manufacturer defended the action on the grounds that a third-party can not be liable for contribution to another party unless it would have also been liable to the first-party plaintiff. Engvall, 632 N.W.2d at 568. The manufacturer then argued that since any claim asserted against it by the first-party plaintiff would have been preempted by the LBIA, it could have no liability to the party seeking contribution. Id. at 568. The court in Engvall rejected this argument, stating that the plaintiff in question could have brought a state common law action directly against the manufacturer for violations of the LBIA, and therefore the defendant had the right to seek contribution against it. Id. As *In re* Asbestos is in direct conflict with both Adkins and Engvall, this Petition should be granted to resolve this conflict.

II. CONCLUSION

Petitioners request that this Petition for Writ of Certiorari be granted by this Honorable Court to remedy this error, and to clarify this important issue of federal law.

Respectfully submitted,

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Appendix A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL
(Consolidated Railroad Cases)

Civil Action No.: 02-C-9004
(Hon. Arthur M. Recht, Judge)

ORDER

On May 6, 2005, cam Defendant Old Orchard Industrial Corp., Individually and as Successor in Interest to Vapor Corporation (hereinafter "Vapor"), by its counsel, Jon B. Orndorff, Esquire, of the law firm of Baker & Lancianese, Defendant Viad Corp., (hereinafter "Viad"), by its counsel, Stephen M. Schwartz, Esquire, of the law firm of Hendrickson & Long, P.L.L.C., and the Plaintiffs, by their counsel Robert F. Daley, of the law firm of Peirce, Raimond & Coulter, P.C., for a Hearing on Viad's Motions for Summary Judgment and Vapor's Renewed Motions for Summary Judgment in the above-referenced consolidated civil action.

Based upon the pleadings and filings of the parties, the applicable law, the arguments of the parties, and the entire court file, this Court here **FINDS** as follows:

1) The parties agree that the claims asserted against these Defendants are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by Defendants Vapor and Viad.

2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. §20701 *et seq.* Syl. Pt. 3, In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003)

3) This Court is bound by the Constitution of the State of West Virginia to follow the West Virginia Supreme Court of Appeals' rulings.

4) Each and every individual claim asserted against Defendants Vapor and Viad in the above-referenced consolidated civil action is preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S. C. § 20701 *et. seq.*

For the foregoing reasons, the Court hereby **GRANTS** Viad's Motion for Summary Judgment and Vapor's Renewed Motions for Summary Judgment and **ORDERS** that any and all claims asserted against Defendants Vapor and Via in the above-reference consolidation civil action are hereby **DISMISSED**, with prejudice.

The Clerk of the Court is directed to send certified copies of this Order to all counsel of records at the addressed below.

ENTERED: This 25th day of July, 2005.

_____

Judge Arthur M. Recht

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL
(Consolidated Railroad Cases)

LAWRENCE ANDREWS, *et al.*,
Plaintiffs

v.

Civil Action No. 02-C-132K
(Kanawha County, WV)

GENERAL MOTORS COMPANY, *et al.*,
Defendants.

ORDER

On this day, came defendant, General Motors Corporation ("GM"), by its counsel, Michael B. Victorson and Jackson Kelly PLLC and come the plaintiffs, by their counsel, Robert F. Daley and Peirce, Raimond & Coulter, P.C., for a hearing upon the oral Motion for Summary Judgment of GM in each of the above-styled civil actions. The said Motion was based upon the same factors and legal arguments asserted and argued by counsel for Old Orchard Industrial Corp., Individually and as Successor in Interest of Vapor Corporation ("Vapor") in its Renewed Motion for Summary Judgment and Viad Corp. ("Viad") in its Motions for Summary Judgment and at a hearing held on May 6, 2005 in most of the same cases. GM adopted and incorporated the arguments and authorities of Vapor and Viad by reference. Counsel for Plaintiffs agreed to such adoption and incorporation, the legal issues and relevant facts relative to GM being identical to those of Vapor and Viad herein and so as not to burden the Court with additional, virtually identical, paper filings. The Court accepts and appreciates the same.

Based upon the pleadings and filings of the parties, the applicable law, the arguments of the parties, and the entire court file, this Court hereby **FINDS** as follows:

1) The parties agree that the claims asserted against GM are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by GM.

2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.* Syl. Pt. 3, In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W. Va. 2003)

3) This Court is bound by the Constitution of the State of West Virginia to follow the West Virginia Supreme Court of Appeals' rulings.

4) All of the claims asserted against GM in each and every one of these civil actions are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et. seq.*

For the foregoing reasons, the Court hereby **GRANTS** the said Motion for Summary Judgment of General Motors Corporation and **ORDERS** that any and all claims asserted against defendant General Motors Corporation in the above styled civil actions are hereby **DISMISSED**, with prejudice, and General Motors Corporation is hereby **DISMISSED** as a party defendant from each of the above styled civil actions with prejudice. The objections and exceptions to the substantive rulings of the Court herein by the plaintiffs are noted and preserved.

The Clerk of the Court is directed to send certified copies of this Order to all counsel of record at the addressed below and to cause a copy of this Order to be filed in each of the above styled civil actions.

ENTERED: This 17th day of June, 2005.

_____

Judge Arthur M. Recht

Appendix B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th of March 2006, the following order was made and entered:

In Re: Asbestos Personal Injury Litigation
Mass Litigation Panel
Kanawha County Civil Action No. 02-C-9004

No. 060036

On a former day, to-wit, January 6, 2006, came the petitioners, Ronald Lee Abbott, et al., by D. Aaron Rihn, Peirce, Raimond & Coulter, P.C., their attorney, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 27th day of July, 2005, with the record accompanying the petition. Thereafter, on the 30th day of January, 2006, came the respondents, Old Orchard Industrial Corp., by Jon B. Orndorff, Baker & Lancianese, its attorney; General Motor Corporation, by Michael B. Victorson, Jackson Kelly PLLC, its attorneys; and Viad Corporation, by Stephen M. Schwartz, Hendrickson & Long, P.L.L.C., its attorney, and presented to the Court their written response thereto.

Upon consideration whereof, this Court is of the opinion to and doth hereby refuse said petition for appeal. Chief Justice Davis disqualified.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

Appendix C

THE LOCOMOTIVE BOILER INSPECTION ACT

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances --

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;
(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter;
(3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20702. Inspections, repairs, and inspection ad repair reports

(a) General – The Secretary of Transportation shall --

(1) become familiar, as far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;
(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals;
(3) ensure that every railroad carrier makes inspections of locomotives and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts. --

(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or

operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance, the carrier may submit a written request for reinspection. On receiving the request, the Secretary shall provide for reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part or appurtenance is in compliance. Id the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be sued only after it is –

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports. -- A railroad carrier shall make and keep in the way the Secretary prescribes by regulation, a report of every --

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures. -- A railroad carrier may change a rule or instruction governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the

Secretary approves a request filed by the carrier to make the change.

49 U.S.C. § 20703. Accident reports and investigations.

(a) Accident reports and scene preservation. -- When the failure of a locomotive, tender, or locomotive or tender part or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender –

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and
(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) Investigations. – The Secretary shall –

(1) investigate each accident and incident reported under subsection (a) of this section;
(2) inspect each part affected by the accident or incident; and
(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.—When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

CERTIFICATE OF SERVICE

I hereby certify that a rue and correct copy of Petitioner's PETITION FOR WRIT OF CERTIORARI was served via first class mail, postage prepaid, this 13th day of June 2006, upon the following:

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FILED

AUG 16 2006

OFFICE OF THE CLERK

No. 05-1608

In The Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

Petitioners,

v.

A-BEST PRODUCTS COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia

RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 16, 2006

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QUESTION PRESENTED

Does the federal Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempt state-by-state regulation, including by the common law, of the design, construction and materials of the locomotive, its parts and appurtenances?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation (GM) states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
DISPUTED JURISDICTION	1
TEXT OF PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE PETITION	6
I. LIA PREEMPTS PETITIONERS' CLAIMS UNDER SETTLED LAW	6
A. The Settled Rule: LIA Preempts State Law On All Matters Within The Secretary's Authority Under LIA	7
B. The Settled Rule Preempts Petitioners' Claims	11
II. THE DECISION BELOW DOES NOT WARRANT CERTIORARI	15
A. Petitioners Did Not Properly Present And Do Not Have A Tort Claim For Supposed Violation Of LIA	16
B. The Lower Courts Agree That LIA Preempts State Tort Law	19
C. The Lower Courts Agree That LIA Preempts Claims Against Manufacturers	23
D. State Law Cannot Regulate Locomotive Design Whether Or Not The Locomotive Is In Use	26

TABLE OF CONTENTS – Continued

Page

E. The Seventh Circuit's *Adkins* Decision Is Off Point 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 17

Adkins v. Illinois Central R.R. Co., 326 F.3d 828 (7th Cir. 2003) 29, 30

Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980) 28

Arnold v. United States, 263 U.S. 427 (1923) 1

Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) 17

Bell v. Ill. Central R.R., 236 F. Supp. 2d 882 (N.D. Ill. 2001) 15

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Bonner v. Union Pac. R.R., 2005 WL 1593635 (D. Idaho 2005) 18

Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001) 20, 22

Carter v. Consolidated Rail Corp., 709 N.E.2d 1235 (Ohio App. 1998), *app. denied*, 694 N.E.2d 75 (Ohio 1998) 15

Cent. of Ga. R.R. v. Markert, 410 S.E.2d 437 (Ga. App. 1991) 15

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TABLE OF AUTHORITIES – Continued

Page

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Darby v. A-Best Prods. Co., 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005) 13, 17, 23, 25

Deans v. CSX Transp., Inc., 152 F.3d 326 (4th Cir. 1998) 28

Dillon v. Chicago Southshore & S. Bend R.R. Co. (In re Train Collision), 670 N.E.2d 902 (Ind. Ct. App. 1996), *transfer denied*, 683 N.E.2d 591 (Ind. 1997), *cert. denied*, 522 U.S. 914 (1997) 15

Eldridge v. Mo. Pac. R.R. Co., 832 F. Supp. 328 (E.D. Okla. 1993) 15

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 19, 21

Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2002) 16, 18

Estes v. S. Pac. Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 28

First Sec. Bank v. Union Pac. R.R. Co., 152 F.3d 877 (8th Cir. 1998) 14, 23

Florida v. Thomas, 532 U.S. 774 (2001) 1

Forrester v. Am. Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 14, 23

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) 29

Furlough v. Union Pac. R.R. Co., 766 So. 2d 751 (La. App. 2000) 15

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) 20

Gen. Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 16

Green v. River Terminal Ry. Co., 585 F. Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985) 15

Hicks v. Miranda, 422 U.S. 332 (1975) 9

Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893) 1

In re West Virginia Asbestos Litig., 592 S.E.2d 818 (W. Va. 2003) ..... *passim*

In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993, 188 F. Supp. 2d 1341 (S.D.Ala.1999) 15

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 20

Keene Corp. v. United States, 508 U.S. 200 (1993) 11

Key v. Norfolk S. Ry. Co., 491 S.E.2d 511 (Ga. App. 1997) 15

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) ..... *passim*

Lilly v. Grand W. Trunk R.R., 317 U.S. 481 (1943) 27

Lorincie v. SEPTA, 34 F. Supp. 2d 929 (E.D. Pa. 1998) 25

Marchus v. Holley, 618 S.E.2d 517 (W. Va. 2005) 17

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 7, 14, 29

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892) 1

TABLE OF AUTHORITIES – Continued

Page

Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104 (D.N.D. 2006) 18

Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461 (1984) 7

Mickleson v. Mont. Rail Link, Inc., 999 P.2d 985 (Mont. 2000) 14, 19

Moore v. Chesapeake & Ohio Railway Co., 291 U.S. 205 (1934) 16

Napier v. Atlantic Coast R.R., 272 U.S. 605 (1926) .....*passim*

Norfolk S. Ry. Co. v. Denson, 774 So. 2d 549 (Ala. 2000) 14

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) 20

Oglesby v. Del. & Hudson Ry., 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999) .....*passim*

Pa. R.R. v. Pub. Serv. Comm., 250 U.S. 566 (1919) 9

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 27

Phillips v. CSX Transp., 190 F.3d 285 (4th Cir. 1999) 28

Pickham v. Maine Cent. R.R. Co., 887 F.2d 875 (1st Cir. 1989) 28

Roth v. I & M Rail Link, LLC, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) 15, 18, 26

S. Ry. v. Lunsford, 297 U.S. 398 (1936) 11, 28

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 20

Scheiding v. General Motors Corp., 77 Cal. Rptr. 2d 339 (Cal. App. 1998), *aff'd*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000) 2

TABLE OF AUTHORITIES – Continued

Page

Scheiding v. General Motors Corp., 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000) ..... *passim*

Seaman v. A.P. Green Indust., Inc., 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 15, 26, 27

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) .. 19, 22

Smith v. Norfolk & W. Ry. Co., 776 F. Supp. 1335 (N.D.Ind.1991) 15

Springston v. Consol. Rail Corp., 130 F.3d 241 (6th Cir. 1997) 8, 14, 23

Steer v. Burlington N., Inc., 720 F.2d 975 (8th Cir. 1983) 28

Taylor AG Indust. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 25

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 16

Trinidad v. Southern Pac. Transp. Co., 949 F.2d 187 (5th Cir. 1991) 28

Union Pac. R.R. v. Motive Equip., Inc., 714 N.W.2d 232 (Wis. App. 2006) 15, 18

United States v. Baltimore & Ohio R.R., 293 U.S. 454 (1935) 8, 10

United States v. Locke, 529 U.S. 89 (2000) 25

United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000) 9

United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) 2, 25

Urie v. Thompson, 337 U.S. 163 (1949) 9, 11

Varney v. Norfolk and W. Ry. Co., 899 F. Supp. 280 (S.D. W. Va. 1995) 28

TABLE OF AUTHORITIES – Continued

Page

Viad Corp. v. Superior Court, 55 Cal. App. 4th 330 (1997) 25

Whaley v. CSX Transp., Inc., 609 S.E.2d 286 (S.C. 2005) 18

STATUTES

28 U.S.C. § 1257(a) 1, 4

42 U.S.C. § 2021(k) (1982) 21

45 U.S.C. § 51, *et seq.* 4, 10, 18

45 U.S.C. § 34 (1993 version, currently restated and recodified at 49 U.S.C. § 21302 23

49 U.S.C. § 20101 *et seq.* 2, 11

49 U.S.C. § 20301 *et seq.* 2

49 U.S.C. § 20701 *et seq.* 3

49 U.S.C. § 20701(2) 27

49 U.S.C. § 20903 3

49 U.S.C. § 21302 24

Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966) 7

Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 § 1(a), 108 Stat. 745 (1994) 11

Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 § 6(a), 108 Stat. 745 (1994) 11

TABLE OF AUTHORITIES – Continued

Page

RULES

49 C.F.R. § 1.49(c)(5), (g) 7
49 C.F.R. § 229.7(b) 24
49 C.F.R. § 229.21 27
49 C.F.R. §§ 229.23-25 27
49 C.F.R. § 229.25(b) 12
49 C.F.R. §§ 229.27-31 27
49 C.F.R. § 229.41 12
49 C.F.R. § 229.43(a) 12
49 C.F.R. §§ 229.46-59 12
49 C.F.R. §§ 229.77-91 12
49 C.F.R. § 229.83 12
49 C.F.R. § 229.89 12
49 C.F.R. § 229.91 12
49 C.F.R. § 229.93 12
49 C.F.R. §§ 229.103-113 12
49 C.F.R. §§ 229.115-139 12
Supreme Court Rule 10 25
Supreme Court Rule 14.1(g)(i) 16
W. Va. R. Civ. Proc. 56(e) 17

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866 24

Locomotive Crashworthiness and Cab Working Conditions: Report to Congress (1996) 13

Railroad Occupational Safety and Health Standards; Termination, 43 Fed. Reg. 10,583 (1978) 10, 18

Robert L. Stern, et al., *Supreme Court Practice* 144 (8th ed. 2002) 1

DISPUTED JURISDICTION

The Court lacks jurisdiction because the decision below is not final under 28 U.S.C. § 1257(a). It does not conclude the litigation as to all parties or all causes of action.

Petitioners sued dozens of defendants. The trial court granted summary judgment only as to three – respondents GM, Viad and Old Orchard. The causes of action on which respondents were sued, such as negligence and strict products liability, remain pending against other defendants. *See* p. 3 below. Thus the judgment is not "final" under § 1257(a) because it is not final "as to all the parties" and "as to all the causes of action involved." *Arnold v. United States*, 263 U.S. 427, 434 (1923). *See, e.g., Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892) (state-court judgment not final because case had been determined as to "only a portion of the defendants"); *Hohorst v. Hamburg-American Packet Co.*, 148 U.S. 262, 264 (1893) ("the suit is still pending and undetermined as against the codefendants," so "this appeal cannot be maintained, because the decree . . . was not a final decree"); Robert L. Stern, et al., *Supreme Court Practice* 144 (8th ed. 2002) ("[W]here there are a number of defendants to the same cause of action, the record must show that the judgment concludes the controversy as to all of them.").[1]

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[1] No exception to the finality requirement, *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), applies. The first, third and fourth exceptions are inapplicable on their face. The second applies only when the federal issue will "survive and require decision regardless of the outcome of future state court proceedings" and the further proceedings "'[can] not remotely give rise to a federal question . . . that may later come here.'" *See Florida v. Thomas*, 532 U.S. 774, 778-79 (2001) (quoting *Cox*, 420 U.S. at 480). That is not this case. The trial against remaining defendants may moot preemption, either by defeating petitioners' claims on other grounds (such as failure to prove asbestos-caused disease) or by providing petitioners complete relief (if they recover damages from other defendants). In addition, the future

(Continued on following page)

The Court accordingly lacks jurisdiction and should deny certiorari.

TEXT OF PROVISIONS INVOLVED

In addition to the portions of the Locomotive Inspection Act quoted by petitioners (Pet. App. C), Article VI, clause 2 of the United States Constitution is involved. It provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

STATEMENT OF THE CASE

GM formerly manufactured railroad locomotives. Some GM locomotives contained asbestos materials on some parts. *See Scheiding v. General Motors Corp.*, 77 Cal. Rptr. 2d 339, 340 n.1 (Cal. App. 1998) (potentially asbestos-containing locomotive parts are: steam generator insulation, exhaust stack insulation, insulating tape, motor insulation, pipe sleeves, gaskets, certain brakeshoes), *aff'd*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000).

Petitioners are "current and former railroad employees." Petition for Writ of Certiorari (Pet.) 1. They variously claim to have been exposed on their railroad jobs to asbestos

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proceedings could easily give rise to further federal questions. Other defendants, including makers of locomotive parts, likely have unadjudicated preemption defenses under the Safety Appliance Acts, 49 U.S.C. § 20301 *et seq.* or the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.* The West Virginia Supreme Court did not resolve the scope of preemption under these Acts and the defenses remain outstanding. *See In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003). Further, there is a very real chance that future proceedings will give rise to further federal questions, because petitioners' claims arise out of employment on railroads, an area "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982).

materials from as many as 60 defendants (not necessarily from GM's locomotives).

Petitioners' complaints proceed on various state law theories, including common-law negligence and products liability under the Restatement of Torts. For example, lead petitioner Ronald Lee Abbott's complaint alleges that defendants, including GM, were "generally negligent in failing to provide a safe product" through conduct such as "carelessly and negligently mining, milling, manufacturing, fabricating, supplying and/or selling the said asbestos and/or asbestos containing products" and "failing to use substitute materials for the asbestos and the asbestos-containing products." (Complaint, *Ronald Lee Abbott v. A-Best Products et al.*, Marshall County, W. Va. No. 00-C-43M ¶ 3608) He also alleges that defendants "are strictly liable . . . under the Restatement of Torts (Second) 402(A)" for, *inter alia,* selling "products which were in a defective condition and unreasonably dangerous." *Id.* ¶ 3611.

Petitioners allege that asbestos materials caused them to contract asbestos-related illnesses, suffer emotional distress, or sustain other damages. All of these alleged damages allegedly result from asbestos materials, the design that called for them, and the construction that used them.

Certain defendants initially moved for summary judgment on several grounds, including preemption by the Locomotive Inspection Act (LIA),[2] 49 U.S.C. §§ 20701-20903. The trial court denied the motion but certified three issues, including LIA preemption, to the West Virginia Supreme Court of Appeals. Agreeing with an "overwhelming body of case law," a veritable "avalanche," the state supreme court held that LIA preempted state

[2] LIA is also variously known as the Locomotive Boiler Inspection Act (LBIA), Boiler Inspection Act (BIA), or Federal Locomotive Inspection Act (FLIA).

tort claims. *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003).[3] The court pointed out that its holding did not leave petitioners without a remedy. As former railroad workers, they "have a remedy against the railroads under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.*" 592 S.E.2d at 822 n.2.

Respondents GM, Viad and Old Orchard then moved for summary judgment based on LIA preemption. The trial court, bound by the state supreme court's decision, granted the motions. Pet. App. A. Petitioners sought leave to appeal to the state supreme court, which was denied. Pet. App. B. Petitioners then filed their petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction because the decision below leaves the case pending as to other parties. Thus there is no final decision under 28 U.S.C. § 1257(a).

There is no issue warranting review anyway. It is settled that LIA occupies the field that is "within the scope of the authority delegated to" the Secretary of Transportation under LIA – including "the design, the construction and the material of every part of the locomotive and of all appurtenances." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926). Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable.

Petitioners' state-law claims attack the locomotive "design" that called for asbestos, the "construction" that

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[3] GM was not a party to the interlocutory West Virginia Supreme Court proceeding.

used it and the asbestos "materials" themselves. They indisputably fall within the Secretary's authority, and petitioners do not claim otherwise. Indeed, the Secretary has specifically regulated the asbestos-containing locomotive parts and addressed asbestos itself, underlining that these matters fall within his authority. Hence petitioners' claims fall squarely within the preempted field, and so, the West Virginia courts properly held, are preempted under *Napier*.

Petitioners do not challenge *Napier* or the long line of cases following it. Instead, they try to change the standard for preemption of tort claims from field preemption to conflict preemption. But *Napier* holds that LIA occupies the field, and its field fully embraces state tort law respecting locomotive design, construction and material, as every federal court of appeals or state court of last resort to address the issue holds. Seeking a way around that mountain of authority, petitioners argue that they might have a claim based on violation of LIA itself. But this argument was not properly presented in the West Virginia courts, which declined to address it. It is moreover incorrect. Nothing in LIA bars asbestos. The Secretary *declined* to bar asbestos.

Petitioners also protest that their state law claims are against manufacturers, and that LIA does not expressly apply to manufacturers. But it expressly does. LIA and its regulations speak to "manufacturer[s] . . . of railroad equipment." It also would not matter if they did not. Petitioners' claims are based on design and materials within the Secretary's authority, and so remain preempted whether the claim is made against the railroad who buys the locomotive or the manufacturer who builds and sells it. Indeed, permitting states to require manufacturers to comply with varying state rules regarding locomotive parts and warnings would yield exactly the patchwork of conflicting state rules regarding them that LIA and *Napier*

are meant to foreclose. Every federal court of appeals or state court of last resort to reach the issue agrees.

Still trying to find a way around the uniform case law holding their claims preempted, petitioners next advise that LIA applies only when the locomotive is "in use." No court has adopted that argument and it is wrong. LIA continues to apply when the locomotive is off-line. Petitioners' argument is, moreover, physically impossible. The locomotive's design is the same whether in use or off-line. Federal law cannot exclusively regulate the locomotive's design, construction and material on-line but allow state law to control them off-line.

Nor is there any reason for this Court to visit these questions. The federal courts of appeals and state supreme courts unanimously hold that LIA preempts state tort law, including claims against manufacturers, including claims based on use of asbestos.

In sum, petitioners do not challenge *Napier*, and identify no on-point appellate case that quarrels with *Napier*'s application on the facts here. No court – none – has reached a holding that would allow petitioners' claims. There is nothing to review.

REASONS FOR DENYING THE PETITION

I. LIA PREEMPTS PETITIONERS' CLAIMS UNDER SETTLED LAW.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

It is settled that LIA occupies the field as to matters within the authority it confers on the Secretary. Petitioners' claims fall within that field. Therefore, they are preempted. When Congress occupies the field, "the States must leave all regulatory activity in that area to the Federal Government." *See Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

A. The Settled Rule: LIA Preempts State Law On All Matters Within The Secretary's Authority Under LIA.

For 80 years, since Justice Brandeis' opinion for the Court in *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926), it has been settled that Congress intended LIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce.

Napier held that Congress intended LIA "to occupy the field" in respect to all areas subject to LIA, and that LIA accordingly preempted all state law within LIA's grant of authority to federal regulators – the Interstate Commerce Commission and now its successor, the Secretary of Transportation, via the Federal Railroad Administration (FRA).[4] *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court held that LIA conferred on the Commission "general" power to

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[4] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

regulate locomotive safety equipment, 272 U.S. at 611-12, and LIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further held that the state laws at issue fell "within the scope of the authority delegated to the Commission" by LIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there were any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

Id. at 613 (emphasis added).

Petitioners do not question *Napier* and it remains settled law.[5] *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (*Napier* holds that LIA

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[5] The 1970 Federal Railroad Safety Act not alter BIA's preemptive effect. *Marshall*, 720 F.2d at 1152-53 (Kennedy., J.) (FRSA purposely left BIA "intact, including its preemptive effect"); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997); *Scheiding v. General Motors Corp.*, 993 P.2d 996, 1000 (Cal. 2000). In enacting FRSA, Congress explicitly said it intended to retain LIA, including precedents interpreting it such as *Napier*, without change. P. 11 below.

occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same); *Consol. Rail Corp. v. Pa. Pub. Util. Comm.*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 654 (E.D. Pa.) (LIA "totally preempts the field of locomotive equipment.").[6] *See also United Transp. Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000) (LIA preempted state locomotive-equipment regulation); pp. 13-15 below (citing numerous additional cases).

There are at least three reasons for this settled rule. First, locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pa. R.R. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
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> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997) (citations omitted); *accord Scheiding v. General*

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[6] This Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

Motors, 993 P.2d 996, 999 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 176 (Ala. 2002).

Second, Congress judged that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. Accordingly, "the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission," now FRA. *Baltimore & Ohio R.R.*, 293 U.S. 454 at 461. FRA "prescribe[s] the rules and regulations by which fitness for service shall be determined. . . . Thus the Commission [now FRA] sets the standard." *Napier*, 272 U.S. at 612. This unitary, expert regulation remains "essential," as the FRA explains:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations. . . . [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination, 43 Fed. Reg. 10,583, 10,585-86 (1978). "[T]he design of locomotives" is thus subject exclusively to FRA regulation, to the exclusion even of other federal agencies. *Id.* at 10587.

Third, Congress provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive,

and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *S. Ry. v. Lunsford,* 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated.

Besides being settled law, *Napier*'s preemption of all matters within federal authority under LIA embodies Congress' expressed intent. Enacting the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, in 1970, Congress reaffirmed that under LIA (and five other laws), "where the Federal Government has authority, with respect to rail safety, it preempts the field"; Congress specifically stated that these laws "have served well" and "chose to continue [them] without change." H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105, 4108. In 1994, Congress recodified LIA and various other transportation laws without substantive change, expressly preserving "the precedent value of earlier judicial decisions," such as *Napier.* Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180, at 3, 5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822. This express statement confirms the normal presumption that in reenacting the statute, Congress "was aware of . . . earlier judicial interpretations and, in effect, adopted them." *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993). *See also Scheiding,* 999 P.2d at 1000; *Consol. Rail,* 536 F. Supp. at 655-57.

B. The Settled Rule Preempts Petitioners' Claims.

Petitioners, railroad workers, claim that asbestos materials in GM's locomotives and locomotive parts (plus

numerous other defendants' asbestos) caused them to contract asbestos-related diseases, and, proceeding on various state law tort theories such as strict liability, claim that the locomotives and their parts were defective in design because they contained asbestos. The West Virginia Supreme Court of Appeals held such claims preempted. *West Virginia Asbestos Litig.*, 592 S.E.2d 818. Its analysis applied *Napier* according to its terms, is absolutely right, and accords with every federal court of appeals or state supreme court decision to address the issue.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances." *Napier*, 272 U.S. at 611. The asbestos-containing components whose design petitioners challenge – insulation, steam generators, exhaust stacks, motors, and others – are locomotive "parts" and "appurtenances." Therefore, their design and materials are within the Secretary's authority and the preempted field. Indeed, the Secretary has issued and considered regulations respecting them, under authority of LIA, underscoring that they are within the Secretary's authority. Federal regulations under LIA govern, *inter alia*, insulation (49 C.F.R. §§ 229.25(b) (2006), 229.89, 229.41, 229.83), motors (49 C.F.R. § 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab itself. (49 C.F.R. §§ 229.115-139). Asbestos in those components is accordingly within the Secretary's authority too.

Indeed, in 1996 the Secretary of Transportation, through FRA, considered asbestos regulation – confirming the Secretary's authority over locomotive asbestos – and decided to take no regulatory action. FRA acknowledged that asbestos was used on older locomotives, and may remain on some locomotives. FRA judged that it posed no health problem and that further regulation of asbestos in locomotives was unwarranted, for very good reasons:

> " . . . FRA has not identified sources of friable asbestos to which crew members could be exposed."
>
> "Asbestos remaining in older [locomotives] is believed to be encapsulated in individual components or systems. FRA could find no evidence of asbestos being a health problem for crews of older locomotives."
>
> "While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment."
>
> "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time" and "recommends no action be taken on the issue of asbestos in locomotives."

Federal Railroad Administration, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* at 10-1, 10-12, 12-9 (1996); *see Scheiding*, 993 P.2d at 999 n.2 (citing FRA report).[7]

Since petitioners' claims attack locomotive parts' design and materials, matters explicitly within the scope of the Secretary's authority, the claims fall within the field and are preempted.

Every federal court of appeals or state court of last resort to address the issue agrees. All hold that LIA preempts tort law respecting design, construction or material of locomotives – including claims against manufacturers, including asbestos claims identical to petitioners'. *See Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio

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[7] Asbestos is not unregulated, however. The federal Occupational Safety and Health Administration, with FRA's agreement, limits workers' exposure to asbestos. *Locomotive Crashworthiness and Cab Working Conditions* at 10-11.

2004) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts), *cert. denied*, 543 U.S. 1146 (2005); *Kilgore*, 853 So. 2d 171 (Ala. 2002) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts); *Scheiding*, 993 P.2d at 999 (Cal. 2000) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts); *In re West Va. Asbestos Litig.*, 592 S.E.2d 818 (same); *see also Law*, 114 F.3d 908 (9th Cir. 1997) (LIA preempts failure-to-warn and design-defect liability, because warnings and designs are "within the scope of the Secretary's authority"); *Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205, 1209 (9th Cir. 2001) (LIA preempts design-defect claim respecting locomotive); *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (LIA preempts design-defect claims respecting warning devices on locomotives because they fall "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Del. & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts tort action claiming that locomotive seat should be designed differently and accompanied by warning), *cert. denied*, 528 U.S. 1004 (1999); *Marshall*, 720 F.2d at 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Mickleson v. Mont. Rail Link, Inc.*, 999 P.2d 985, 997 (Mont. 2000) (LIA preempts common-law action claiming that locomotive should be more conspicuous); *see also Norfolk S. Ry. Co. v. Denson*, 774 So. 2d 549, 555-57 (Ala. 2000) (LIA precludes judicial decision requiring air conditioners in locomotives). A wealth of

federal district court and state intermediate appellate cases agrees.[8] In all, at least 25 cases so hold.

Far from creating any conflict, the West Virginia courts joined this "avalanche" of case law. 592 S.E.2d at 822.

II. THE DECISION BELOW DOES NOT WARRANT CERTIORARI.

Petitioners stretch to conjure a conflict and to poke holes in LIA's field, but the arguments are tortured, and ultimately reveal a misunderstanding of preemption.

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[8] *See Seaman v. A.P. Green Indust., Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (locomotive-asbestos claim preempted); *Eldridge v. Mo. Pac. R.R. Co.*, 832 F. Supp. 328, 330 (E.D. Okla. 1993) (negligence and strict liability design defect laws for failure to install warning devices on locomotives preempted); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D.Ala.1999) (LIA preempts passenger and employee common-law negligence and design-defect claims); *Roth v. I & M Rail Link, LLC*, 179 F. Supp. 2d 1054 (S.D.Iowa 2001) (LIA preempts state common-law tort claims against manufacturer of locomotive cab); *Bell v. Ill. Central R.R.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001); *Green v. River Terminal Ry. Co.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); *Smith v. Norfolk & W. Ry. Co.*, 776 F. Supp. 1335, 1342-43 (N.D.Ind.1991); *Carter v. Consolidated Rail Corp.*, 709 N.E.2d 1235, 1239 (Ohio App. 1998), *app. denied*, 694 N.E.2d 75 (Ohio 1998); *Furlough v. Union Pac. R.R. Co.*, 766 So. 2d 751, 761 (La. App. 2000); *Dillon v. Chicago Southshore & S. Bend R.R. Co. (In re Train Collision)*, 670 N.E.2d 902, 908-11 (Ind. Ct. App. 1996), *transfer denied*, 683 N.E.2d 591 (Ind. 1997), *cert. denied*, 522 U.S. 914 (1997); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511, 513 (Ga. App. 1997); *Cent. of Ga. R.R. v. Markert*, 410 S.E.2d 437, 438 (Ga. App. 1991). The lower courts so hold down to today. *See Union Pacific R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232, 235 (Wis. App. 2006) (tort claim preempted; under *Napier*, "federal law preempts all state claims, leaving no area within which states may act").

A. Petitioners Did Not Properly Present And Do Not Have A Tort Claim For Supposed Violation Of LIA.

Petitioners first claim that the West Virginia decision conflicts with cases allowing state law to provide remedies for violation of the federal Safety Appliance Act, such as *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934), *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), and *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916). Pet. 4-6. They later claim it conflicts with a Minnesota decision holding that Minnesota law could provide a remedy for violation of LIA. *See* Pet. 19 (citing *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 571 (Minn. 2002)). Apparently their idea is that asbestos could violate LIA itself, and that a tort claim premised on such a violation would not be preempted. Pet. 8, 19. There is nothing to review.

To begin, petitioners do not show that their theory was properly raised or passed on below, *see* Supreme Court Rule 14.1(g)(i), and it was not. Petitioners' complaints did not allege a LIA violation. They alleged only *state*-law theories such as negligence and strict products liability. P. 3 above. Accordingly, counsel for respondents pointed out in both the West Virginia Supreme Court and the trial court that no alleged violation of LIA or SAA was properly raised. (Reply Brief of Appellant Old Orchard Industrial Corp. on the Certified Questions, at 19; Transcript of Hearing in Circuit Court, May 2, 2002, at 46-47) Similarly, in response to respondents' summary judgment motions, petitioners provided no evidence of a LIA violation, let alone one that caused their injuries. Nor did they ever explain what LIA provision or regulation was supposedly violated by asbestos.[9] Consequently, neither the trial court

[9] Petitioners merely claimed they could recover "[i]f the plaintiffs in this case can demonstrate that the defendants['] products were

(Continued on following page)

nor the West Virginia Supreme Court addressed the argument. *See* Pet. App. A, B; *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818.

Thus there is no properly-presented issue to review. "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) (quotations omitted). Moreover, petitioners' failure to provide evidence or reasoned argument that respondents violated LIA is an adequate and independent state-law ground for the West Virginia courts' decision to disregard the contention. *See Adams v. Robertson*, 520 U.S. 83, 87-88 (1997) (failure to raise issue properly in state court may be viewed as adequate and independent state-law ground to disregard argument). Nor is there any developed record on the contention.

But passing petitioners' failure to preserve the argument, there is nothing to it. Every court of last resort to address the issue holds that LIA preempts asbestos claims. *Darby*, 811 N.E.2d 1117; *Kilgore*, 853 So. 2d 171; *Scheiding*, 993 P.2d 996; *West Va. Asbestos Litig.*, 592 S.E.2d 818; *see* pp. 13-15 above. Petitioners cannot point to any LIA provision or regulation violated by asbestos,

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violations of the LBIA or the SAA." (Plaintiffs' Omnibus Response to Various Defendants' Motions for Summary Judgment Based on Federal Preemption at 25) As a matter of West Virginia law, speculation that they might be able to prove a violation was not enough to avoid summary judgment. *See Marchus v. Holley*, 618 S.E.2d 517, 525 (W. Va. 2005) (party "cannot create a genuine issue of material fact through mere speculation" but "must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor") (quotations omitted); W. Va. R. Civ. Proc. 56(e) (party cannot rest on allegations but must provide evidence).

because there is none. There is none because FRA judged none was warranted, finding "no evidence that the presence of asbestos [in locomotives] poses a problem to humans or the environment." *Locomotive Crashworthiness* at 10-12; pp. 12-13 above. FRA "prescribe[s] the rules and regulations by which fitness for service shall be determined" and "sets the standard," *Napier*, 272 U.S. at 612, and its decision is conclusive under petitioners' own case. *See Engvall*, 632 N.W.2d at 567 ("when the FRA has found a particular design of a part or appurtenance to be safe . . . a jury cannot find otherwise").[10]

Again, however, this discussion is beside the point. Petitioners' claims were brought under state negligence and products liability law, not LIA. Pp. 3, 16 above. Every federal court of appeals and state supreme court to reach the issue holds such claims preempted.

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[10] Because petitioners could not recover under *Engvall*, there is no occasion to review it. We note, however, that it is an outlier to the extent it allows a state-law claim based on alleged LIA violation. Published decisions elsewhere have only rejected, never followed, it on this point. *See Roth v. I & M Rail Link, LLC*, 179 F. Supp. 2d 1054 (S.D.Iowa 2001) (rejecting *Engvall*); *Bonner v. Union Pac. R.R.*, 2005 WL 1593635, *9 (D. Idaho 2005) (rejecting *Engvall*); *Mehl v. Canadian Pac. Ry.*, 417 F. Supp. 2d 1104, 1115 (D.N.D. 2006) (rejecting *Engvall*); *Union Pac. R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232, 237-38 (Wis. App. 2006) (rejecting *Engvall*); *see also Denson*, 774 So. 2d at 555-58 (Ala. 2000) (to maintain FRA's exclusivity, court could not impose duties under federal law beyond FRA equipment regulations); *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 299 (S.C. 2005) (same; state law could not impose new duties under guise of borrowing LIA standard). These decisions are certainly correct; FRA judges it is "essential" that a "single agency" regulate safety and "piecemeal regulation" by others "would be disruptive and contrary to the public interest." *See* 43 Fed. Reg. at 10,585-86; p. 10 above. And, no LIA-borrowing tort claim is needed because railroad employees like petitioners already have FELA claims (borrowing LIA if necessary) against their railroads. *See* 45 U.S.C. § 51 (FELA); *In re West Virginia Asbestos Litig.*, 592 S.E.2d at 822 n.2; pp. 10-11 above. Certiorari is not warranted to correct *Engvall*'s isolated mistake; the lower courts are rejecting it on their own.

B. The Lower Courts Agree That LIA Preempts State Tort Law.

Petitioners next argue that their claims, although within the field Congress preempted, should nevertheless go forward because they are brought under state tort law. Pet. 6-7. There is no lower-court conflict here either. Every federal court of appeals or state supreme court to reach the issue holds that LIA preempts tort claims in its field. *E.g., Law,* 114 F.3d 908; *Oglesby,* 180 F.3d 458; *Scheiding,* 993 P.2d 996; *Mickelson,* 999 P.2d 985; pp. 13-15 above. None allows a claim to go forward on petitioners' theory.

Still, petitioners argue, tort claims should be preempted only if they "conflict" with LIA or exert a "direct and substantial effect" on the federal regulatory scheme. Pet. 6-7. LIA, however, occupies the field. *Napier,* 272 U.S. at 613. As petitioners' own cases demonstrate, Congress' relevant "intent" in occupying the field is "to exclude state regulation" from the field, so *any* state law in the field necessarily "conflicts with" that intent and is preempted. *English v. Gen. Elec. Co.,* 496 U.S. 72, 79-80 n.5 (1990); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted."). Thus, whether state tort law conflicts with federal rules, or whether there are any federal rules at all, remains "without legal significance." *Napier,* 272 U.S. at 613.

It has, moreover, been settled for over 40 years that tort claims are designed to affect conduct, regulate just as statutes and regulations do, and are accordingly preempted as statutes and regulations are:

> ***[R]egulation can be as effectively exerted through an award of damages*** as through some form of preventive relief. The ***obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.*** Even the ***States' salutary effort to redress private***

> ***wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.***

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-47 (1959) (emphasis added). Thus this Court has repeatedly applied ordinary preemption principles to common-law damage actions. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-74 (2000) (products-liability claim was preempted; "ordinary pre-emption principles" applied); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (common-law claim for personal injuries was preempted; "ordinary" preemption principles applied); *Cipollone*, 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so failure to warn claims alleging personal injury were preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987) (common-law nuisance claims preempted); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (Federal Railroad Safety Act "pre-empts respondent's state tort claim").

The federal circuits and state supreme courts are simply following the *Garmon* principle according to its terms. *E.g.*, *Scheiding*, 996 P.3d at 1003 (asbestos claim preempted; U.S. Supreme Court "has long rebuffed efforts to draw this artificial distinction" between common and statutory law; quoting *Garmon*); *Kilgore*, 853 So. 2d at 179 (quoting *Garmon*); *Darby*, 811 N.E.2d at 1125; *see also Law*, 114 F.3d at 910 (quoting *Garmon*); *Oglesby*, 180 F.3d at 462 ("For a locomotive carrier or manufacturer, the source of the damages, whether statutory or common law, is irrelevant, and both must therefore be preempted by the BIA.").

Petitioners never discuss *Garmon* or come to grips with its logic. Their attempts to avoid it misread their

cases. *English* did not require a "direct and substantial effect" on a federally-regulated matter before a tort claim was preempted, as petitioners claim. Pet. 6. In *English*, the federal law preempted the field as to state law motivated by nuclear safety concerns, but saved state laws with "purposes other than protection against radiation hazards." 496 U.S. at 82, 84 (quoting 42 U.S.C. § 2021(k) (1982)) (emphasis omitted). This Court held that a state law was preempted if *either* (a) it had a safety purpose *or* (b) even if not motivated by safety, it had a "direct and substantial effect" on safety decisions. 496 U.S. at 84-85. This analysis applied not just to tort law but to state statutes including "state minimum wage and child labor laws." 496 U.S. at 85.

Thus, the "direct and substantial effect" language petitioners cite did not un-preempt state law within the field Congress set out to occupy – it *preempted* state law outside that field. It set up no special rule for tort claims. And it interpreted a different statute not here at issue. Ultimately it is beside the point. *Napier* defines the field Congress occupied in LIA, it holds that LIA preempts all state law, regardless of effect on federal regulations even whether there are federal regulations, and Congress deliberately reaffirmed it. Pp. 7-11 above.

In any event, the supposed *English* rule is easily satisfied here. "[S]tate-law claims would have a direct and substantial effect on the uniformity of locomotive design, construction, and material mandated by Congress through the BIA." *Scheiding*, 993 P.2d at 1002. If each state adopted different liability-triggering standards, locomotives would have to change equipment at the border or carry equipment required by the most stringent state's law. "Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Law*, 114 F.3d at 911.

Petitioners get no further in arguing that only "conflict[ing]" tort claims are preempted under *Silkwood*, 464 U.S. 238. Pet. 7. In *Silkwood*, federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing tort law remedies." 464 U.S. at 251-52. The legislative history showed that Congress assumed and intended common-law remedies to remain available. 464 U.S. at 251, 253-54, 256. Hence, as this Court has said, "our decision [in *Silkwood*] *turned on specific statutory evidence*" that Congress had intended to preserve state common law claims. *Buckman*, 531 U.S. at 352 (quoting *Silkwood*, 464 U.S. at 257) (emphasis added).

That is not the case under LIA, as the lower courts agree. Nothing in *Silkwood* allows state tort law to intrude when the statute "contains no evidence Congress assumed or intended state remedies for design defects would be preserved." *Scheiding*, 993 P.2d at 1001 (quotations omitted); *Kilgore*, 853 So. 2d at 178. There is no such evidence here. Instead, Congress created a different compensation scheme, FELA, that does not undermine uniformity. *See Law*, 114 F.3d at 912; pp. 10-11 above. And, unlike *Silkwood*, LIA's field must include tort law to achieve Congress' purpose in preempting. LIA could not remove "the design, the construction, and the material of every part of the locomotive" from state regulation, *Napier*, 272 U.S. at 611, and so provide uniform national regulation, if juries in each state imposed liability in respect to the design, construction or materials of those parts, based on 50 states' different laws. *Scheiding*, 993 P.2d at 1001; *Kilgore*, 853 So. 2d at 178. That patchwork is exactly what LIA and *Napier* are meant to foreclose. *Law*, 114 F.3d at 910-11; *Scheiding*, 993 P.2d at 1001-02. *Silkwood*, in fact, confirms the normal rule: when Congress occupies a field, "any state law" in the field is preempted. 464 U.S. at 248.

Thus, none of the cases petitioners cite is on point, much less creates a conflict with current law, let alone support the holes petitioners try to poke in LIA's pre-empted field.

C. The Lower Courts Agree That LIA Pre-empts Claims Against Manufacturers.

Petitioners argue that their claims, although within the preempted field, are saved because brought against a manufacturer who made the locomotive rather than the operator who ran it. Pet. 8-16. No appellate court has ever permitted avoidance of field preemption on that ground.

To the contrary, every federal circuit or state court of last resort to consider the argument rejects it, and holds that LIA preempts state law directed at locomotive manufacturers when it seeks to regulate matters within the occupied field. *Oglesby,* 180 F.3d at 462 (defect and failure to warn claim against manufacturer preempted); *Springston,* 130 F.3d at 244-45 (defect claim against manufacturer preempted); *Law,* 114 F.3d at 911-12; *Forrester,* 255 F.3d at 1210 (claim against locomotive crane manufacturer preempted); *First Security,* 152 F.2d at 880-81 (quoting *Law*); *Darby,* 811 N.E.2d at 1125-26 (asbestos claim against locomotive manufacturer preempted; that plaintiff sued manufacturer was "not legally significant"); *Scheiding,* 993 P.2d at 999, 1003-04 (same); *Kilgore,* 853 So. 2d at 175-76 (same).

Those uniform rulings are right, indeed inevitable. LIA by its terms applies to manufacturers, contrary to petitioners' claim. Pet. 12. LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994, 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49 U.S.C. § 21302).[11] The 1994 recodification act

[11] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made

(Continued on following page)

omitted that as "surplus" (*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make clear that Congress intended no substantive change. Agency regulations reflect LIA's application to manufacturers; they penalize any "manufacturer ... of railroad equipment ... who violates any requirement of ... the Locomotive Inspection Act" or locomotive safety regulations under it – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b).

Additionally, the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier,* 272 U.S. at 611. Manufacturers are at the center of that field; they design and construct locomotives. *See Oglesby,* 180 F.3d at 462 (LIA preempts claims against manufacturers; "the design and construction of a part are in the hands of a manufacturer.") If states could set standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts that complied with those state standards. Railroads would have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly the state regulation of locomotives that LIA and *Napier* forbid.

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform,

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"explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. *See also* n.12.

> federal railroad regulations would be undermined. . . .

See Law, 114 F.3d at 910-13; *Darby*, 811 N.E.2d at 1125-26 (quoting *Law*); *Scheiding*, 993 P.2d at 1003-04 (quoting *Law*); *Kilgore*, 853 So. 2d at 175 (quoting *Law*).

Moreover, field preemption turns on whether the subject of the claim is within the preempted field – not "on whom the legal duty is imposed." *See Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is asbestos parts of motors, brake shoes, steam generators and so forth. P. 2 above. That subject is squarely within the preempted field, and so preempted.

Petitioners' contrary argument rests on one district court decision, *Lorincie v. SEPTA*, 34 F. Supp. 2d 929 (E.D. Pa. 1998). This Court does not ordinarily review claimed conflicts with district court decisions. Sup. Ct. R. 10. And *Lorincie* is a minority of one, for good reason. It relied on a supposed presumption against preemption. 34 F. Supp. 2d at 934. But "[a]n 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (involving ship design). Thus no such presumption applies here; railroads have been "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687-88 (1982). *Lorincie* also wrongly assumed that LIA does not apply to manufacturers, 34 F. Supp. 2d at 934, but LIA does. Pp. 23-24 above. In addition, *Lorincie* rested on two lower court cases that have since been overturned.[12] No surprise, *Lorincie* has

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[12] *See Lorincie*, 34 F. Supp. 2d at 933 n.3, 934 n.6 (citing *Viad Corp. v. Superior Court*, 55 Cal. App. 4th 330 (1997) and district court decision in *Oglesby v. Delaware & Hudson Ry.*, 964 F. Supp. 57 (N.D.N.Y. 1997)); *Scheiding*, 993 P.2d at 1004 n.6 (overruling *Viad*); *Oglesby*, 180 F.3d 458 (reversing district court decision in *Oglesby*).

been rejected on this point by every court to address it. *See Oglesby,* 180 F.3d at 462; *Kilgore,* 853 So. 2d at 176-77; *Roth v. I & M Rail Link, LLC,* 179 F. Supp. 2d 1054, 1061 (S.D. Iowa 2001).

Ultimately petitioners admit that LIA must preempt claims against manufacturers. Pet. 14. They argue that conflict preemption principles should govern, but cite no authority. There is none; because LIA occupies the field, whether the proposed state law conflicts with a federal law is "without legal significance." *Napier,* 272 U.S. at 613. Every circuit or state court of last resort to address the question agrees that LIA preempts claims against manufacturers. There is, again, nothing to review.

D. State Law Cannot Regulate Locomotive Design Whether Or Not The Locomotive Is In Use.

Petitioners next advise that LIA "only applies when a railcar or locomotive is in 'use or allowed to be used,'" so preemption applies only when the locomotive is in "use or allowed to be used," and try to interest the Court in a supposed debate over the meaning of "in use." Pet. 16-18. There is, again, nothing to review Petitioners do not cite any lower-court case holding that LIA preemption turns on whether the locomotive was in use at the time. None does, for very good reasons.

First, petitioners' argument is impossible. Petitioners argue that states should be able to regulate a locomotive's design, construction, parts or materials when the locomotive is being repaired off line, while the FRA exclusively regulates the design when it's in operation on line. That is nonsense. A locomotive's design, parts, construction and materials are the same on line or off. Indeed, the off-line roundhouse's job is to put the locomotive and its on-line parts in condition to operate on line. Thus, *Seaman*, 707 N.Y.S.2d at 302, soundly rejected petitioners' notion,

explaining it is "irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use." 707 N.Y.S.2d at 302.

Second, the federal field is defined not by *where* the regulation is applied but by the physical "object" that is regulated. *Napier,* 272 U.S. at 611-13. The physical object of petitioners' proposed state regulation is the locomotive and the design, construction, and material of its parts. Therefore, the regulation is preempted. *Id.*

Third, contrary to petitioners' theory, Pet. 16, LIA continues to apply when the locomotive is off-line. LIA regulates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. Regulations under LIA require daily inspections (49 C.F.R. § 229.21); inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49 C.F.R. §§ 229.23-25 and Form FRA F180-49A); and further tests annually and biennially. (49 C.F.R. §§ 229.27-31); *see also Lilly v. Grand W. Trunk R.R.,* 317 U.S. 481, 486-87 (1943) (approving rules under LIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month and cab aprons to be "maintained in a safe and suitable condition"). These LIA-regulated activities occur off-line. Indeed, LIA commands that a locomotive not inspected, tested and repaired while off-line can't be used at all on line. 49 U.S.C. § 20701(2).

Fourth, petitioners' express textual argument is misplaced. Implied field occupation results not from the statute's text but from the dominance of the federal interest and the statute's purpose, structure, and pervasiveness. *See Pennsylvania v. Nelson,* 350 U.S. 497, 502-504 (1956). Thus, LIA's occupation of the field – and the scope of the field – is discerned not from the text but from

the "broad scope of the authority conferred upon the [FRA]." *Napier,* 272 U.S. at 611, 613; *Law,* 114 F.3d at 910-12; *Oglesby,* 180 F.3d at 462. State-law requirements, on- or off-line, would infringe that authority and disrupt uniformity and the federal regime, and so are preempted.

Particularly here. Any regulation of locomotive parts necessarily applies to the manufacturer upon delivery of the locomotive; "once they sell the train, it's out of their hands." *Law,* 114 F.3d at 912 n.3. State regulation of locomotive parts, whether applicable on line or off, would therefore require the manufacturer to deliver–and accordingly the railroad to buy – a locomotive meeting the state regulation. That is exactly what preemption of state law forbids. *Cf. Law,* 114 F.3d at 910-11; pp. 9-10 above.

Petitioners' cases (Pet. 16-18) say nothing different. None has anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads alleging that the railroad failed to discharge its absolute LIA duty to maintain locomotives and parts by, for example, permitting ice or grease buildup on a locomotive while it is off line. They simply hold that the railroad's absolute duty to maintain applies to the locomotive's operation on line, but not when it is in repair or at rest off line, because a locomotive while off line (perhaps for months) needn't be in condition to operate on line. *E.g., Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir. 1998); *Pickham v. Maine Cent. R.R. Co.*, 887 F.2d 875, 882 (1st Cir. 1989); *Steer v. Burlington N., Inc.*, 720 F.2d 975 (8th Cir. 1983); *Estes v. S. Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979); *see also Phillips v. CSX Transp.*, 190 F.3d 285 (4th Cir. 1999) (SAA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (SAA). Others similarly hold that experimental or detached parts were not subject to LIA's absolute duty to maintain. *See Lunsford*, 297 U.S. 398; *Varney v. Norfolk and W. Ry. Co.*, 899 F. Supp. 280, 282 (S.D. W. Va. 1995).

The absolute duty to maintain has nothing whatever to do with preemption. LIA preempts state law where the absolute duty to maintain does not apply at all. *Marshall*, 720 F.2d at 1152 (railroad owes no duty to maintain experimental devices, but state regulation of them is preempted).

But this is much ado about nothing. No case endorses the nonsensical proposition that federal law exclusively regulates design on line but state law can regulate it off line, when the design is the same whether off or on line. That cannot work. To the contrary, *Napier* determined 75 years ago that LIA preempts the field of the design, construction and materials of every part of the locomotive. 272 U.S. at 611-13. Plaintiff's claims attack the design, construction and materials of locomotive parts, and so fall squarely within the preempted field.

E. The Seventh Circuit's *Adkins* Decision Is Off Point.

Still trying to avoid the uniform case law preempting their claims, petitioners claim that the decision below conflicts with *Adkins v. Illinois Central R.R. Co.*, 326 F.3d 828 (7th Cir. 2003). Pet. 18-19. Not at all. *Adkins* concerned *complete* preemption, a jurisdictional doctrine off any point here. Complete preemption allows a case filed in state court to be removed to federal court. It happens only when a federal law *both* preempts the state-law claim *and* authorizes a cause of action arising under federal law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6-8 (2003); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983). *Adkins* held that LIA did not *completely* preempt a claim because LIA did not authorize a "federal forum." 326 F.3d at 835. *Adkins* emphasized that it merely decided the case was not removable and was not

answering whether preemption was a "defense." *Adkins*, 326 F.3d at 835. Every federal circuit or state supreme court holds that preemption is a defense to claims like petitioners'. Pp. 13-15 above.

* * *

Napier has been the law for over 80 years. Petitioners cite no case from any court that questions *Napier*'s controlling force over claims like these, and no case that would allow their claims to proceed. Petitioners present no issue to review here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 05-1608

In The
Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

Petitioners,

v.

A-BEST PRODUCTS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia

BRIEF OF RESPONDENT OLD ORCHARD INDUSTRIAL CORP., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO VAPOR CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state common-law tort claims against manufacturers of locomotive equipment are preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6 of the Supreme Court Rules, Old Orchard Industrial Corp. states that it is a wholly owned subsidiary of Brunswick Corporation, a publicly traded entity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
I. NO FINAL ORDER HAS BEEN ENTERED	1
II. THE WEST VIRGINIA SUPREME COURT CORRECTLY APPLIED PREEMPTION ANALYSIS AND RELIED UPON PRIOR RULINGS OF THIS COURT	2
A. The West Virginia Supreme Court Correctly Applied the Federal Preemption Analysis Set Forth in Multiple Cases by this Court	3
B. As this Court Determined in *Napier*, through the BIA, the United States Congress has Enacted a Comprehensive Regulatory Scheme, Which Preempts the Entire Field of Locomotive Safety and Equipment	4
C. The BIA Precludes All State Regulation, Including State Law Tort Claims	12
D. State Tort Claims against Locomotive and Locomotive Part Manufacturers are Preempted	15

TABLE OF CONTENTS – Continued

Page

III. THE WEST VIRGINIA DECISION DOES NOT CONFLICT WITH ANY DECISION FROM ANOTHER STATE COURT OF LAST RESORT OR UNITED STATES COURT OF APPEALS 18

A. *Adkins v. Illinois Central R.R.* 18

B. *Engvall v. Soo Line R.R.* 19

IV. BIA PREEMPTION APPLIES REGARDLESS OF WHETHER A LOCOMOTIVE IS ON OR OFF LINE 20

V. NOTHING HAS CHANGED SINCE THIS COURT DECLINED TO REVISIT THE PREEMPTIVE SCOPE OF THE BIA ON FIVE OCCASIONS IN THE LAST TEN YEARS 21

VI. THE WEST VIRGINIA SUPREME COURT'S DECISION IS IN AGREEMENT WITH EVERY OTHER APPELLATE COURTS ADDRESSING THE SAME ISSUES 22

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adkins v. Illinois Central R.R., 326 F.3d 828 (7th Cir. 2003) 18, 19

Asahi Metal Indust. Co. v. Superior Court, 480 U.S. 102 (1987) 17

Bonner v. Union Pacific R. Co., 2005 WL 1593635 (D. Idaho 2005) 19

California Bankers Association v. Schultz, 416 U.S. 21 (1974) 20

Capozi v. Blanchette, 433 F. Supp. 704 (W.D. N.Y. 1977) 15

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)... 4, 15

Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa.) 6

Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 2

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1

CSX Transp., Inc. v. Eastwood, 507 U.S. 658 (1993) 15

Dillon v. Northern Indiana Commuter Transp. Dist., 522 U.S. 914 (1997) 7, 21

Eldridge v. Missouri Pacific R., 832 F. Supp. 328 (E.D. Okla. 1993) 15

English v. General Electric Co., 496 U.S. 72 (1990) 12

First Security Bank v. Union Pacific R. Co., 152 F.3d 877 (8th Cir. 1998) 6, 13, 14, 23, 28

TABLE OF AUTHORITIES – Continued

Page

Forrester v. American Dieselectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 6, 26

Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 4

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 15

Hicks v. Miranda, 422 U.S. 332 (1975) 6

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 21

King v. Southern Pacific Transp. Co., 855 F.2d. 1485 (10th Cir. 1988) 6

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) ..... *passim*

Lilly v. Grand Trunk Western R. Co., 317 U.S. 481 (1943) 9

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 3

Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n, 476 U.S. 355 (1986) 4

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 6, 12, 15, 21, 26

Michigan Carriers and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461 (1984) 13

Missouri Pacific R. Co., v. Railroad Comm'n of Texas, 833 F.2d 570 (5th Cir. 1987) 6

Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926) ..... *passim*

Oglesby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2nd Cir. 1999) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Oglesby v. General Motors Corp., 528 U.S. 1004 (1999) 6

Ouellette v. Union Tank Car Co., 902 F. Supp. 5 (D. Mass. 1995) 15

Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983) 29

Pacific Transp. Co. v. Public Util. Comm'n. of Oregon, 9 F.3d 807 (9th Cir. 1993) 11

Poe v. Ullman, 367 U.S. 497 (1961) 19

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 1

Renne v. Geary, 501 U.S. 312 (1991) 19

R.J. Corman R. Co. v. Palmore, 999 F.2d 149 (6th Cir. 1993) 7, 17

Roth v. I&M Rail Link, L.L.C., 179 F. Supp.2d 1054 (S.D. Iowa 2001) 19

San Diego Bldg. Trades Council Millman's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) 28

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) .. 13, 15

Springston v. Consolidated Rail Corp., 130 F.3d 241 (6th Cir. 1997) ..... *passim*

Southern Pacific Transp. Co. v. Pub. Util. Comm'n of Oregon, 9 F.3d 807 (9th Cir. 1993) 11

Southern Ry. v. Lunsford, 297 U.S. 398 (1936) 11

Taylor AG Ind. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 16

U.S. v. Locke, 529 U.S. 89 (2000) 4

TABLE OF AUTHORITIES – Continued

Page

United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000) 6

United Transp. Union v. Long Island R. Co., 455 U.S. 678 (1982) 6, 7

Urie v. Thompson, 337 U.S. 163 (1949) 7, 8, 11, 14

STATE CASES

Carrillo v. ACF Ind., Inc., 20 Cal. 4th 1158, 86 Cal. Rptr. 2d 832, 890 P.2d 386 (1999) ..... *passim*

Central of Georgia R. Co. v. Markert, 200 Ga. App. 851, 410 S.E.2d 437 (1991) 6, 15

Darby v. A-Best Products, Inc., 811 N.E.2d 1117 (Ohio 2004) 7, 21, 22, 25

Dillon v. Chicago South Shore & South Bend R. Co., 683 N.E.2d 591 (Ind. 1997) 7, 21

Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001) 19, 20

Furlough v. Union Pacific R. Co., 766 So.2d 751 (La. App. 2000) 7

In re: Train Collision at Gary, Indiana, 670 N.E.2d 902 (Ind. App. 1996) 6, 15, 16

Key v. Norfolk Southern Ry. Co., 288 Ga. App. 305, 491 S.E.2d 511 (1997) 6, 15

Kilgore v. General Motors Corporation, 853 So.2d 171 (Ala. 2002) 7, 16, 22, 24

Norfolk Southern Ry. Co. v. Denson, 744 So.2d 549 (Ala. 2000) 6

TABLE OF AUTHORITIES – Continued

Page

Scheiding v. General Motors Corp., 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996 (2000) ..... *passim*

Sisson v. Seneca Mental Health, 404 S.E.2d 425 (W.Va. 1991) 2

Union Pac. R.R. v. Motive Equip., 714 N.W.2d 232 (Wis. App. 2006) 19

UNITED STATES CONSTITUTION

U.S. Const. Art. VI, cl. 2 3

FEDERAL STATUTES

28 U.S.C. § 1257 1

45 U.S.C. § 51 *et seq.* 11

45 U.S.C. § 431 (1969) 10

49 U.S.C. § 20106 12

49 U.S.C. §§ 20301-20306 8

49 U.S.C. §§ 20701 8

49 U.S.C. §§ 20701, *et seq.* 3

49 U.S.C. §§ 20701-20903 8

49 U.S.C. § 21302 ..... 16, 17

49 U.S.C. §§ 20101-20144 (1994) 12

Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, 106 Stat. 972 10

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS

49 C.F.R. §§ 91.10-11 (1939) 9
49 C.F.R. § 91.12 (1939) 9
49 C.F.R. § 91.16 (1939) 9
49 C.F.R. § 91.18 (1939) 9
49 C.F.R. § 91.20 (1939) 9
49 C.F.R. § 91.200 (1939) 9
49 C.F.R. § 91.253 (1939) 10
49 C.F.R. § 91.254 (1939) 9
49 C.F.R. §§ 91.304-05 (1939) 9
49 C.F.R. §§ Part 229 8
49 C.F.R. § 229.7(b) 16
49 C.F.R. § 229.21 8
49 C.F.R. §§ 229.23-25 ..... 8, 9
49 C.F.R. § 229.25(b) 9
49 C.F.R. § 229.27 9
49 C.F.R. §§ 229.27-31 9
49 C.F.R. § 229.31 9
49 C.F.R. § 229.41 9
49 C.F.R. § 229.43(a) 8
49 C.F.R. §§ 229.46-59 8
49 C.F.R. §§ 229.77-91 8
49 C.F.R. § 229.83 9
49 C.F.R. § 229.89 9

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. § 229.91 8

49 C.F.R. §§ 229.93-101 8

49 C.F.R. §§ 229.103-113 ..... 8, 9

49 C.F.R. §§ 229. 115-135 8

49 C.F.R. § 230.0 16

MISCELLANEOUS

Sup. Ct. Rule 10 22

Form FRA F180-49A 9

Locomotive Crashworthiness and Cab Working Conditions (1996) 10

STATEMENT OF THE CASE

Respondent Old Orchard Industrial Corp., individually and as Successor-in-Interest to Vapor Corporation, states that the background information provided in the Petition for Writ of Certiorari is generally correct.

REASONS TO DENY THE PETITION

I. NO FINAL ORDER HAS BEEN ENTERED.

This Court should decline to address the issues involved herein because there are no final orders or judgments in these cases. The jurisdiction of this Court to review decisions of the highest courts of each state is primarily limited to the review of a "final judgment or decree." 28 U.S.C. § 1257. The exceptions to the final judgment limitation are "very few." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (outlining the four categories of exceptions to this Court's jurisdictional requirement of a final order). None of those exceptions apply to this case.

Petitioners' number well over 7000 individuals and have filed claims against approximately 40 defendants. At this time, counsel for this Respondent is unaware of the resolution of any of these civil actions. Regardless, Petitioners have failed to establish that a final order has been entered in any of these cases.

Even though the trial court's determination as to the claims asserted by the Petitioners against the Respondents is final, no final orders have been entered for the entirety of these cases. Although a number of the defendants have likely settled or been dismissed, no final order dismissing the case in its entirety has been entered. The reason is that a number of defendants not currently before this Court still have claims pending against them.

The appeal proceeded in the West Virginia court system because a final order is not a prerequisite of the West Virginia Supreme Court of Appeals. *Sisson v. Seneca Mental Health*, 404 S.E.2d 425, 427-28 (W.Va. 1991) (noting that the West Virginia court has a less restrictive interpretation of Rule 54(b)). Although the West Virginia Supreme Court could proceed with the appellate review, this Court should be reluctant to entertain the appeal at this time. What other potential reviewable issues may surface any of these seven thousand claims as to any of the numerous remaining defendants are unknown at this point. As this Court is well aware, the asbestos litigation presents numerous due process pitfalls, and could result in additional appeals for this Court's review.

The primary purpose of the final judgment requirement for this Court's review is to avoid piecemeal reviews of the case. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). If the Court rules on the issues presented in the Petition, remaining issues in these cases as to other defendants may result in a return of the cases to this Court. Until all of the claims against all of the defendants in the cases are resolved, this Court's requirement for the review of final orders has not been met. Thus, the denial of the writ is appropriate.

II. THE WEST VIRGINIA SUPREME COURT CORRECTLY APPLIED PREEMPTION ANALYSIS AND RELIED UPON PRIOR RULINGS OF THIS COURT.

Even if the Court determines that sufficient final orders have been entered with respect to the Respondents, the West Virginia Supreme Court correctly applied the federal law and the preemption analysis, which this Court has repeatedly outlined. This Court has already decided the federal questions involved in the West Virginia Supreme

Court's decision. The West Virginia Supreme Court relied upon and correctly applied this Court's holding in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), as to the scope of the preemptive field of the Locomotive Boiler Inspection Act (49 U.S.C. § 20701 *et seq.* ("BIA")).

Moreover, the issue of whether Congress intended the BIA to preempt state law claims has been addressed in on-point opinions by the courts of last resort of four states, inclusive of West Virginia, and at least four United States Courts of Appeals. The West Virginia Supreme Court's decision is wholly in agreement with every one of these appellate court decisions. All of these courts agree with the decision of the West Virginia Supreme Court, which Petitioners seek to appeal. Because all of the state courts of last resort and the United States Courts of Appeal have been unanimous in favor of preemption and because all of the federal questions raised by the Petitioners have previously been determined by this Court, the denial of the Petition for Writ of Certiorari is appropriate.

A. The West Virginia Supreme Court Correctly Applied the Federal Preemption Analysis Set Forth in Multiple Cases by this Court.

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2, quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full

objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-69 (1986); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Petitioners assert that the West Virginia Supreme Court failed to begin its analysis with a presumption against preemption. However, this Court has unequivocally held that there is no "'assumption' of non-pre-emption ... when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (national and international maritime commerce). In this case, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*; *see also Carrillo*, 20 Cal. 4th 1158, 1163, 86 Cal. Rptr. 2d 832, 890 P.2d 386 (1999). Thus "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108.

B. As this Court Determined in *Napier*, through the BIA, the United States Congress has Enacted a Comprehensive Regulatory Scheme, Which Preempts the Entire Field of Locomotive Safety and Equipment.

This Court has already explicitly addressed the preemption power of the BIA in *Napier*, holding that the BIA occupies the entire field. The Court examined the scope of the BIA and found that the United States Congress had preempted the entire field of locomotive safety and equipment, which encompasses all state law within the scope of authority delegated to the Secretary of Transportation

including the design, construction and materials of locomotives and their parts. *Napier*, 272 U.S. at 611-13.

It has been settled for almost 80 years, since this Court's decision in *Napier*, that the preemptive scope of the BIA precludes all state law respecting locomotives and locomotive parts, material or equipment used in interstate commerce. *Napier* held that Congress intended the BIA "to occupy the field" in respect of all areas subject to the BIA and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission. 272 U.S. at 613. Those areas include "the design, the construction, and the material of every part of the locomotive" – the "'entire locomotive . . . and all parts and appurtenances thereof.'" *Id.* at 611, 608.

State law concerning "the design, the construction, or the material" of any part or appurtenance of the locomotive is thus preempted because it is within the Commission's authority – whether or not the state law conflicts with the federal rule, and whether or not there is any applicable federal rule at all (*Napier*, 272 U.S. at 613 (emphases added)):

> *It is also urged that, even if the Commission has power to prescribe* an automatic firebox door and a cab curtain, *it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, . . . if true, is without legal significance.* The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

Napier remains the law of the land.[1] The locomotive parts that Petitioners attempted to claim were defective in the action below fall squarely "within the scope" of FRA's authority, and thus, within the preempted field. *Napier*, 272 U.S. at 611. The following appellate holdings agree that *Napier* still controls: *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir. 1999), *cert. denied sub nom., Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-61 (5th Cir. 2000); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549, 553-55 (Ala. 2000); *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, *cert. denied*, 531 U.S. 958 (2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana*,

[1] Indeed, in 1983, this Court summarily affirmed a decision that "locomotive equipment" is "an area totally preempted by" the BIA. *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983). The Supreme Court's summary affirmance is a binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So. 2d 556 (2001); *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002); *Darby v. A-Best Products, Inc.*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005).

As this Court explicitly stated in *Napier*, 272 U.S. at 611:

> The BIA provides exclusive federal authority to regulate the design, construction and material of every part of the locomotive and tender as well as all appurtenances. . . . The BIA preempts any state law that regulates locomotive equipment because the BIA was enacted with the congressional intent to occupy the field of locomotive equipment.

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo*, 20 Cal. 4th at 1163, (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) –

are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

The BIA grants federal regulators authority over "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611-13. The BIA requires locomotives to be "safe to operate without unreasonable danger of personal injury," 49 U.S.C. § 20701, and to that end vests in the Secretary of Transportation, rule-making power adequate to protect employees against disease as well as against accidents, and "the power to make rules for employee health has been exercised." *Urie*, 337 U.S. at 193 (BIA covered employee injury from long-term inhalation of sand dust on locomotive).

The Federal Railroad Administration ("FRA") regulates railroads under delegation of authority from the Secretary of Transportation. The FRA has exercised its authority to regulate the design, construction and material of the locomotive and all of its parts, including, for example, cab seats, wheel brakes, hand brakes, couplers, handholds, sill steps, running boards, and ladders, *see* 49 C.F.R. Part 229 (locomotive safety standards), and specifically motors (49 C.F.R. §§ 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab (49 C.F.R. §§ 229.115-135).

The BIA mandates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. 49 U.S.C. § 20701; *see generally*, 49 U.S.C. §§ 20701-20903. Regulations under the BIA require daily inspections (49 C.F.R. § 229.21); thorough inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49

C.F.R. § 229.23-25 and Form FRA F180-49A); and further tests annually and biennially (49 C.F.R. § 229.27-31).[2]

The locomotive parts Petitioners claim are defective fall squarely within the federal authority over "every part" of the locomotive. This Respondent's steam generators are specifically regulated, 49 C.F.R. §§ 229.103-113. Further, insulation must be inspected and kept in good condition, and must be present when the federal regulations require it. *See* 49 C.F.R. §§ 229.25(b) (requiring periodic inspection of "visible insulation"), 229.89 (prohibiting "[b]roken or badly chafed insulation" on certain connections), 229.41 (exposed pipes carrying hot gases or high voltage must be "equipped with guards to prevent personal injury"), and 229.83 (certain parts that may become electrically charged must be insulated).[3]

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[2] Under these regulations, for example, brake components must be "cleaned, repaired or replaced," a steam-generator component must be "removed and inspected," the main reservoir must be "hammer tested over its entire surface," "all internal and external surfaces" must be inspected at specified intervals, and a periodic inspection must be performed annually. 49 C.F.R. §§ 229.27, 229.31; *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486-87 (1943) (approving rules under the BIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month, and cab aprons to be "maintained in a safe and suitable condition").

The BIA has regulated inspection and maintenance since at least the 1930s. For example, when steam boilers were in common use, BIA regulations required periodic removal, partial disassembly, cleaning, inspection for cracks and other damage inside and out, and testing of the boilers. *See, e.g.*, 49 C.F.R. §§ 91.10-11, 91.16, 91.18, 91.304-05 (1939). BIA regulations expressly held railroads responsible for "repair" and maintenance of locomotives. 49 C.F.R. §§ 91.12, 91.20, 91.200 (1939).

[3] Federal regulation of locomotive insulation extends back before the Petitioners would have begun working on or around locomotives. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation ... shall be made and all

(Continued on following page)

As further evidence that asbestos on locomotives falls within the purview of the federal government, Congress enacted the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, 106 Stat. 972, on September 3, 1992. Section 10 of that Act amended § 202 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431) ("FRSA"), as amended by the 1992 Act, by adding at the end of § 202 a new subsection (t) requiring the Secretary of Transportation to assess "the extent to which environmental ... conditions in locomotive cabs affect ... health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The 1992 Act required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations."

Pursuant to this mandate, in September 1996, the FRA issued a Report to Congress addressing whether asbestos was a possible factor affecting locomotive cab safety and working conditions. It expressly found that asbestos on locomotives posed no health problem and that further regulation of asbestos was unwarranted. FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9 (1996).

The BIA is, in sum, comprehensive, and "was intended to occupy the field." *Napier*, 272 U.S at 611-13. The BIA's field includes "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," indeed any matter within federal regulators' authority under the BIA. *Napier*, 272 U.S. at 611-13. In addition, the BIA's field preemption is integral

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defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

to Congress's scheme of promoting interstate commerce. Congress intended to ensure trains are subject to "one set of equipment regulation," so that the rules do not change when the trains cross state lines:

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances ... through interstate commerce. The virtue of uniform national regulation is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."

Law v. General Motor Corp., 114 F.3d at 910 (quoting *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993)). Train regulation is "peculiarly [a subject] that cries for uniform law." *Carrillo*, 20 Cal. 4th at 1169. Otherwise, permitting state standards would require cars and locomotives to change "as they cross state lines, or adhere to the standard set by the most stringent state," and would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, provides a uniform federal system of compensation for on-the-job injuries – "a mechanism that doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. In a FELA action, the BIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law" under FELA. *Urie*, 337 U.S. at 189. Congress intended the BIA, SAA and FELA to be considered together, *Urie*, 337 U.S. at

180, and preemption applies with special force to railroad workers' injuries (*Law*, 114 F.3d at 910):

> It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate in respect of any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposely left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern*, 720 F.2d at 1152-53; *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA's preemptive scope remains intact, just as it did almost 80 years ago when this Court ruled in *Napier*.

C. The BIA Precludes All State Regulation, Including State Law Tort Claims.

Petitioners argue that state law is not preempted unless it conflicts with, frustrates, or directly and substantially affects a federal law. However, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from the field, so any state law in the field necessarily "conflicts with" that intent and is preempted. *English v.*

General Electric Co., 496 U.S. 72, 79-80 n.5 (1990). "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), and "[t]he States must leave all regulatory activity in [the occupied field] to the Federal Government." *Michigan Carriers and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984).

Further, *Napier* and a long line of other cases reject the Petitioners' argument. This Court in *Napier* stated that a conflict or substantial effect on a federally regulated matter is irrelevant to field preemption. *Napier* found that state laws were preempted even if they promoted the same purpose as the federal act, *i.e.*, safety. 272 U.S. at 610-11, 613. Whether state law is "inconsistent with" federal requirements is "without legal significance"; so is whether the Commission "has not seen fit to exercise its authority" on the matter at all. *Id.* at 613. Consequently, a state law's having only an "incidental" effect on commerce does not save it. *Id.* at 611.

Every appellate court to address the issue agrees. "[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the BIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place." *Oglesby*, 180 F.3d at 461; *Springston*, 130 F.3d 241; *Law*, 114 F.3d 908; *First Security Bank*, 152 F.3d at 880-81. Congressional occupation of the field "leaves no place for state common law actions," (1) whether "consistent, complementary, additional, or otherwise" to federal law and (2) although no federal regulation directly speaks to the issue. *Carrillo*, 20 Cal. 4th at 1168 (citation omitted).

The Petitioners misstate field preemption analysis. There is no requirement to show particular actions preempted. *All* law in the field is preempted. In *Napier*, the Court did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. In *Oglesby*, *Springston*, *First Security* and *Law*, the Second, Sixth, Eighth and Ninth Circuits respectively found state-law claims preempted regardless of whether Congress (or the FRA) considered the "particular" equipment or claims there at issue, or even tort claims generally. Because the BIA occupies the field, tort claims within the field are preempted *absent evidence Congress intended to preserve them*. *Carrillo*, 20 Cal. 4th at 1168-69.

Petitioners' claims here fall squarely within the field. Petitioners allege that the Respondents' products were defective because their parts included asbestos materials. The West Virginia Supreme Court correctly determined that the claims are therefore preempted because they directly attack the "design," "construction" and "material" of "part[s] of the locomotive." *Napier*, 272 U.S. at 611.

Regulation of all locomotive parts and materials is within the "broad scope of the authority conferred upon the [Secretary]." *Napier*, 272 U.S. at 611-13; *Law*, 114 F.3d at 911; *Oglesby*, 180 F.3d at 461. So, in particular, is the protection of employees against inhalation of hazardous substances. *Urie v. Thompson*, 337 U.S. at 193 (silicosis from inhalation of locomotive sanders). Indeed, the Secretary already regulates insulation under the authority of the BIA, specifically considered regulating asbestos, and found further regulation of it unwarranted.

Field preemption "by definition means congressional intent generally extends beyond the express terms of the

statute and regulations to all aspects coming within their contemplation," including common-law claims. *Carrillo*, 20 Cal. 4th at 1168;[4] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-870; *Cipollone*, 505 U.S. at 521-23. That rule is squarely applicable to the BIA. *Oglesby*, 180 F.3d at 460-61, 462 (BIA preempts common-law defect and failure-to-warn claims concerning an engineer's seat); *Law*, 114 F.3d at 910-11 (BIA preempts common-law design defect and failure-to-warn claims concerning insulation, engines and brakes); *Springston*, 130 F.3d at 244-45 (BIA preempts common-law negligence and strict liability design defect claims for failure to install better warning devices on locomotive); *Marshall v. Burlington Northern*, 720 F.2d at 1152; *Eldridge v. Missouri Pacific R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Key v. Norfolk Southern Railway Co.*, 491 S.E.2d 511; *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902; *Central of Ga. R. Co. v. Markert*, 410 S.E.2d at 438 (similar); *cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658-675 (1993). (FRSA preempts common-law claims); *Ouellette v. Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (same); *Capozzi v. Blanchette*, 433 F. Supp. 704, 705 (W.D. N.Y. 1977) (FRSA preempts common-law design defect claim).

D. State Tort Claims against Locomotive and Locomotive Part Manufacturers are Preempted.

The Petitioners assert that the preemptive scope of the BIA does not apply to manufacturers. (Pet. at 8-15). However, every federal court of appeals and every state supreme court to consider the issue agrees that the BIA preempts state tort claims against manufacturers. The Second Circuit

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[4] Petitioners rely on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238. It changes nothing. *Scheiding*, 22 Cal. 4th at 480 ("unlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort recovery").

so held in *Oglesby*, 180 F.3d 458, as did the California's Supreme Court in *Scheiding*, 22 Cal. 4th 471, the Alabama Supreme Court in *Kilgore v. General Motors Corporation*, 853 So.2d 171, and the Ohio Supreme Court in *Darby*. The Ninth and Sixth Circuits have likewise so held. As the Ninth Circuit stated in *Law*, the "distinction [between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-12. *Accord*, *Springston*, 130 F.3d at 244-45 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement. . . ."). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier*, 272 U.S. at 611. Since Petitioners' claims fall within the field, they are preempted. *Accord*, *Law*, 114 F.3d at 911-12.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to

determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[5]

Moreover, because the preemptive field, namely, the "design, the construction, and the material of every part of the locomotive" is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

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[5] *Cf. Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdiction would "undoubtedly create[ ] an additional deterrent to the manufacture of unsafe components" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

As the Ninth Circuit explained in *Law*, "[a]part from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state . . . " *Id.* at 910-11. The goal of the BIA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devices on locomotives crossing state lines. To facilitate this goal, the BIA applies to manufacturers of locomotives and their component parts as well as to railroad carriers. Petitioners' state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and those claims are preempted.

III. THE WEST VIRGINIA DECISION DOES NOT CONFLICT WITH ANY DECISION FROM ANOTHER STATE COURT OF LAST RESORT OR UNITED STATES COURT OF APPEALS.

A. *ADKINS V. ILLINOIS CENTRAL R.R.*:

Petitioners attempt to assert that one United States Court of Appeals decision, *Adkins v. Illinois Central R.R.*, 326 F.3d 828 (7th Cir. 2003), opposes the avalanche of cases finding preemption. However, the Seventh Circuit was presented in Adkins solely with the question of whether a district court's determination that subject matter jurisdiction was lacking could be subject to appellate review. *Id.* at 829. The Seventh Circuit followed numerous prior decisions in determining that the district court's order was not subject to review. Not surprisingly, the District Court had previously dismissed the claims against the locomotive manufacturer based on BIA preemption and determined that since the locomotive manufacturer was no longer in the case, BIA preemption no longer applied, and the court lacked subject matter jurisdiction. *Id.* at 830. No locomotive or locomotive part manufacturer remained in the case when

the appeal was sought to the Seventh Circuit. Further, the issue involved complete preemption, not field preemption. *Id.* Thus, the limited holding in *Adkins* does not oppose the avalanche of adverse authority from other jurisdictions, either state or federal.

B. *ENGVALL V. SOO LINE R.R. CO.*:

Petitioners argue that the West Virginia decision conflicts with the case of *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001). In *Engvall*, the Minnesota Supreme Court was confronted with the issue of whether a state common law cause of action for negligence *per se* for the violation of the Boiler Inspection Act could be maintained by a common carrier against a locomotive manufacturer. Although the *Engvall* court created such a cause of action in Minnesota, no other court has agreed. *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp.2d 1054 (S. D. Iowa 2001); *Union Pac. R.R. v. Motive Equip.*, 714 N.W.2d 232 (Wis. App. 2006); *Bonner v. Union Pacific R. Co.*, 2005 WL 1593635 (D. Idaho 2005).

More importantly, the cause of action presented to the Minnesota Supreme Court in *Engvall* has not been asserted in this action. None of the West Virginia courts have addressed the issue. Consequently, justiciability is lacking because the issue is not ripe for this Court's review.

Justiciability concerns the standing of litigants to assert particular claims and the appropriate timing of judicial intervention. *Renne v. Geary*, 501 U.S. 312, 320 (1991). Proper resolution of justiciability issues "requires examination of the pleadings and record to determine the nature of the dispute and the interests of the parties in having it resolved in this judicial proceeding." *Id.* at 315. Factors that the Court should consider in determining whether an issue is ripe are hardship to its denial, *Poe v. Ullman*, 367 U.S. 497 (1961), and the availability of an

adequate factual record. *California Bankers Association v. Schultz*, 416 U.S. 21 (1974).

Here, such a cause of action was not asserted in any of the Complaints or Amended Complaints below. At no time have the Petitioners moved to amend their complaints to include such a claim. Consequently, Petitioners will not endure any hardship because they have not even asserted the cause of action addressed in *Engvall*. Moreover, there are no facts or decisions from the trial court or West Virginia Supreme Court addressing such a cause of action. Therefore, whether the cause of action asserted in *Engvall* can be maintained, should not be reviewed by this Court.

IV. BIA PREEMPTION APPLIES REGARDLESS OF WHETHER A LOCOMOTIVE IS ON OR OFF LINE.

Petitioners' attempt to assert the "in use" or "off-line" exception to the BIA is misplaced. The requirements of the BIA are still applicable whether the locomotive is "on-line" or "off-line." The purpose of the "in use" exception to the strict liability standard is to allow a railroad the opportunity to bring a locomotive into its repair shop to repair the item which violates the BIA. The "off-line" exception in no way limits the scope of Congress's broad preemption of the entire field of locomotive parts and appurtenances.

None of the cases cited by Petitioners have anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads alleging that the railroad failed to discharge its absolute BIA duty to maintain locomotives and parts by, *e.g.*, permitting ice or grease buildup on a locomotive while it is off-line; these cases simply hold that the railroad's absolute duty to maintain applies to the locomotive's operation on-line but not when the locomotive is in repair or at rest off-line, for the very good reason that a locomotive while off-line (perhaps for months)

need not be in condition to operate on-line. The absolute duty to maintain has nothing whatsoever to do with preemption; the BIA preempts state law where the absolute duty to maintain does not apply at all, on-line or off. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (railroad owes no duty to maintain experimental devices, but state regulation of them is preempted). The "off-line" exception only abrogates the strict liability standard imposed on railroads for any violations of the BIA, which cause injury to a railroad employee.

Petitioners' assertion that states may regulate the design of locomotive parts off-line would require railroads to meet conflicting state standards off- and on-line; or – assuming no conflict – either to meet the most stringent state regulation on- and off-line or not to repair locomotives needing repair in states whose most stringent off-line regulations the locomotive does not meet. Requiring locomotives to "adhere to the standard set by the most stringent state" would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169. Deterring railroads from repairing locomotives in any state would make no sense at all, indeed would flatly violate Congress's mandate that locomotives be maintained and promptly repaired wherever they go. That would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress," and would be preempted on that ground as well. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987).

V. NOTHING HAS CHANGED SINCE THIS COURT DECLINED TO REVISIT THE PREEMPTIVE SCOPE OF THE BIA ON FIVE OCCASIONS IN THE LAST TEN YEARS.

By denying certiorari in *Dillon* (1997), *Springston* (1998), *Oglesby* (1999), *Scheiding* (2000), and *Darby*

(2005), this Court has rejected the opportunity to revisit the scope of the BIA five times in the last ten years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and no federal court of appeals or state court of last resort has made a conflicting decision. *See* Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari." The West Virginia Supreme Court's decision was exactly the same as the decision appealed from the California Supreme Court in *Schieding* and the Ohio Supreme Court in *Darby*.

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those four cases. Instead, as is discussed in more detail below, an even greater litany of cases has now agreed that Petitioners claims fall within the field preempted by the BIA. Accordingly, as the Court in *Napier* found almost 80 years ago, the BIA preempts the entire field of locomotive safety and equipment, including the design, construction and materials of the locomotive, its parts and appurtenances.

VI. THE WEST VIRGINIA SUPREME COURT'S DECISION IS IN AGREEMENT WITH EVERY OTHER APPELLATE COURTS ADDRESSING THE SAME ISSUES.

The trial court's and West Virginia Supreme Court's determinati[illegible] is entirely consistent with every other appellate court addressing BIA preemption of state law tort claims. The case law is unanimous in finding state law tort claims involving locomotive equipment are preempted by the BIA.

Three other state courts of last resort have specifically ruled on the issues raised by the Petitioners: the California Supreme Court in *Scheiding*, the Alabama Supreme Court in *Kilgore*, and the Ohio Supreme Court of Appeals in *Darby*.

All three agree with the West Virginia courts, and all three involved substantially identical facts as those at issue herein. In addition, the United States Courts of Appeals for the Second, Sixth, Eighth, and Ninth Circuits, *Oglesby*, *Springston*, *First Security*, and *Law*, respectively, have all reached the same conclusion as the West Virginia courts.

Scheiding v. General Motors Corp.: The California Supreme Court in *Scheiding v. General Motors Corp.*, *supra*, held that the BIA preempts asbestos claims against the manufacturers of locomotives. The court reviewed the history of BIA preemption and concluded that "*Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action against locomotive manufacturers for defective design of their product." The court ruled that all state causes of actions against locomotive manufacturers for asbestos exposure are preempted by the federal BIA. Reiterating the rationale from *Napier*, the court explained that the broad preemptive sweep is necessary to ensure uniform national regulation and avoid the need to remove or add equipment between states. *Scheiding*, 93 Cal. Rptr.2d at 345.

The court noted that in addition to compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *Id.* at 345. If each state were to establish different liability-triggering standards, manufacturers would be forced to sell locomotives whose equipment could be changed as the locomotive crossed each state line. Obviously, Congress's goal of uniform regulations would be undermined. *Id.*

The *Scheiding* court emphasized that imposing tort liability on locomotive manufacturers clearly would affect the design, the construction, and the material of locomotives. The imposition of tort liability on railroad equipment manufacturers would force them to conform to

design and construction standards imposed by the states, transferring the locus from the Secretary of Transportation to state courts and thereby constraining the Secretary's regulatory authority and undermining the goal of uniformity. *Id.* at 348.

The *Scheiding* court also addressed the absence of any specific regulation of asbestos by the Secretary of Transportation. The court found that although there are no regulations regarding asbestos, such a regulatory scheme is entirely within the purview and the prerogative of the Secretary of Transportation. The court further stated that warning requirements are also within the scope of the Secretary's authority because the subject matter of any such labels would fall under the BIA. Accordingly, the California Supreme Court held that all claims of asbestos exposure to asbestos on locomotives are preempted by the Boiler Inspection Act.

***Kilgore v. General Motors Corporation*:** The Alabama Supreme Court also found preemption under the BIA in *Kilgore v. General Motors Corporation, supra*. The plaintiffs asserted state law product defect and failure to warn claims against General Motors for their father's alleged exposure to asbestos from locomotives during his work for the railroad. The Alabama Supreme Court found that the trial court improperly denied GM's motion for summary judgment because the claims were preempted by the BIA. The court acknowledged *Napier* as the seminal case establishing the BIA's preemptive effect and agreed that the preemptive scope of the BIA included state law causes of action.

The court specifically addressed the Petitioners' assertion herein that the federal statute should be narrowly construed and that state tort law actions will not be preempted unless they specifically conflict with the federal statute. *Id.* at 177-78. Noting that this Court has already

determined that the BIA occupies the entire field of locomotive equipment, he Alabama Supreme Court found that "narrowness is n an issue; the [BIA] preempts the entire field." *Id.* The urt also dismissed the argument that there is a presu ption against preemption by explaining that an "ass nption of non-pre-emption [sic] is not triggered when th State regulates in an area where there has been a histo of significant federal presence" as is the case with the ilroad industry. *Id.* at 178 (*citing Locke*, 529 U.S. 89).

The court noted hat the BIA does not explicitly regulate asbestos and xplained that "Congress intended for the BIA to occup the field; thus, the Secretary of Transportation has th discretion to regulate those areas he or she so chooses." *I* at 178-79. The Alabama Supreme Court agreed with th arguments made by the Respondents herein that the FRA has addressed asbestos and determined that no egulations are required. Consequently, the use of bestos on locomotives is clearly within the preempted eld.

Darby v. A-Best roducts, Inc.: The Ohio Supreme Court also tackled the identical issues raised herein and, likewise, found that he BIA preempts "state tort law claims against the m ufacturers of railroad locomotives asserting injury cause by exposure to asbestos contained in railroad locomotiv ." *Darby*, 811 N.E.2d at 1125-26. The plaintiffs alleged at the railroad and manufacturers had caused them to be exposed to asbestos, which resulted in their alleged injuri s. *Id.* at 1119. The court noted the trial and appellate d isions, which have all found state law claims against ra oad manufacturers are preempted by the BIA, and exp ssly cited to and incorporated the West Virginia Suprem Court's decision in its ruling. *Id.* at 1125.

Consequently, all of the state courts of last resort, which have addressed the issues presented herein, have agreed with the trial court's and West Virginia Supreme Court's decision below.

***Law v. General Motors Corp.*:** On three occasions, the Ninth Circuit has held that state common law tort claims against locomotive equipment manufacturers are preempted by the BIA. *See Law*, 114 F.3d at 913; *accord Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempted state common law tort claims of a non-railroad employee injured by locomotive crane); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (common law negligence action against railroad manufacturers alleging inadequate warning devices on a locomotive are preempted by the BIA). In *Law*, railroad employees brought various state common law tort actions for hearing loss against the manufacturers of locomotive engines and brakes. *Law*, 114 F.3d at 909.

In affirming the district court's dismissal based on BIA preemption, the Ninth Circuit noted that "[i]t has long been settled that *Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.*" *Id.* at 910 (emphasis added). The court also recognized that the purpose of tort liability is an effort to persuade defendants to follow a standard of care that is established by the state common law, and the court rejected plaintiffs' argument that the field occupied by the BIA did not apply to state tort claims directed against manufacturers. *Id.* at 911.

The Ninth Circuit also rejected the plaintiffs' argument that injured railroad workers would be left without a remedy, finding Congress intended the FELA to be an exclusive remedy. *Id.* at 912. The court reasoned that placing the potential of liability for injuries to railroad

workers solely upon the railroad employers would result in the railroads purchasing only from manufacturers whose products comply with the BIA. *Id.* The court concluded that, due to the fact that the railroads would demand BIA compliant products, the manufacturers had a strong incentive to comply with the BIA and that the preemption of state common law tort claims did not compromise the safety of railroad workers. *Id.*

The Ninth Circuit relied on the language of the BIA and this Court's language in *Napier*, noting that the federal government has "established a comprehensive, national regime of locomotive regulation. This regime – enforced by FELA and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives." *Id.* Because this field is broad enough to encompass design defect claims against locomotive equipment manufacturers, the Ninth Circuit held the claims were preempted.

***Oglesby v. Delaware & Hudson Ry. Co.*:** The Second Circuit likewise found that the BIA preempts state tort claims. *See Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2nd Cir. 1999). In *Oglesby*, a railroad employee brought a FELA action against his employer and a state common law tort claim against a locomotive manufacturer, claiming he was injured adjusting a cab seat. *Id.* at 460. The district court denied the manufacturer's motion for summary judgment, finding no preemption. *Id.*

The Second Circuit disagreed. The court explained that the field occupied by the BIA includes manufacturers as well as railroads because the scope of the BIA extends to "both the 'design' and 'construction' of a locomotive's parts." *Id.* (citing *Napier*, 272 U.S. at 611). According to the court, the intent of Congress would be best accomplished by including manufacturers in the scope of the BIA

because the design and construction of locomotive parts are left in the hands of the manufacturer. *Id.* The Second Circuit rejected the plaintiff's argument that the BIA only preempts legislation and regulations but not state common law tort causes of action because the preemption of state common law tort claims is necessary to maintain the "uniformity of the BIA." *Id.* The court noted that "an award of damages can act as a 'potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Bldg. Trades Council Millman's Union v. Garmon*, 359 U.S. 236, 247 (1959)). Because tort damages can force compliance with a state imposed standard, whether the source of damages comes from a statute or a common law remedy has no relevance. Both sources of regulation force railroad manufacturers to comply with a standard of care established by the state. *Id.*

First Security Bank v. Union Pacific R.R.: The Eighth Circuit has held that state tort claims against railroad manufacturers are preempted. *See First Security Bank v. Union Pacific Railroad*, 152 F.3d 877 (8th Cir. 1998). In *First Security Bank*, the plaintiff was the administrator of the estate of a woman who was killed when her car was struck by a train at a railroad crossing. *Id.* at 878-879. The plaintiff claimed, in part, that the horn employed on the train that struck the plaintiff's decedent was inadequate to warn a person in a car of her make and model. *Id.* at 880. The district court dismissed the plaintiff's state common law tort claim on the basis of field preemption under the BIA. *Id.*

According to the Eighth Circuit, if each state were to adopt a different standard for triggering liability, the uniformity that was intended by Congress when it enacted the BIA would be subverted. *Id.* (quoting *Law*, 114 F.3d at 910-911). Because the plaintiff's state common law tort claim fell into a field of regulation that had been occupied

by the federal government, the Eighth Circuit held that the plaintiff's claim was preempted. 152 F.3d at 880-81.

***Springston v. Consolidated Rail Corp.*:** The Sixth Circuit addressed the preemptive scope of the BIA and found that state common law tort law claims against railroad manufacturers are preempted. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir.1997). In Springston, the plaintiff brought claims against a railroad and train manufacturer after the vehicle in which he was traveling was struck by a train at a rail crossing. *Id.* at 243. The district court granted summary judgment in favor of the manufacturer, and partial summary judgment in favor of the railroad, ruling the plaintiff's claims that the railroad and manufacturer negligently failed to properly equip the train with visual warning devices were preempted. *Id.*

The Eighth Circuit stated that "[w]here Congress intends to occupy a field, state law in that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-13 (1983)). The Eighth Circuit noted that Congress intended to confer the scope of regulating all aspects of locomotive components to the federal government, thereby occupying this field and preempting state control. *Springston*, 130 F.3d at 245. This preemptive effect created by the occupation of this field is extensive and includes state common law tort claims. *Id.*

It is also important to note that despite the Petitioners' claim that all of these cases sprung out of the *Law* decision, [Pet. at 13], *Springston* was argued on the day that the *Law* decision was issued. Moreover, *Springston* does not even mention the *Law* case in its decision. Accordingly, the Sixth and Ninth Courts of Appeal unknowingly and separately reached the same conclusion. The West Virginia courts are in agreement with those decisions.

Because the decisions of the state courts of last resort and the United States Courts of Appeals are unanimous and wholly consistent with the decision of the West Virginia trial court and West Virginia Supreme Court below, the denial of the writ is appropriate.

CONCLUSION

For all of the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-1608

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IN THE

Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

Petitioners,

v.

A-BEST PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY

BRIEF IN OPPOSITION FOR RESPONDENT VIAD CORP

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QUESTION PRESENTED

Are state common-law tort claims against manufacturers of locomotive equipment preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Viad Corp has no parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

Question Presented i

Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices xv

Jurisdiction 1

Statement of the Case 1

Summary of Argument 4

Reasons for Denying the Petition 6

I. *Napier v. Atlantic Coast Line R. Co.*: Congress Intended Completely to Occupy the Field of Locomotives and Locomotive Parts 6

II. An "Avalanche" of Federal and State Appellate Case Law Holds that the BIA Preempts Common-Law Claims Against Locomotive Manufacturers 10

Contents

Page

III. *In re West Virginia Asbestos Litigation* Does Not Conflict With Decisions of This Court ... 14

IV. Petitioners Have a Potent Remedy Under FELA 19

V. Decisions by the Seventh Circuit Court of Appeals and the Minnesota Supreme Court Do Not Undercut the Avalanche of Authority Foreclosing Petitioners' State Tort Claims 21

VI. The BIA Applies to Locomotives Whether They Are "On Line" or "Off Line" 24

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

CASES:

Adkins v. Illinois Central R. Co., 326 F.3d 828 (7th Cir. 2003) 21, 22

Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980) 26, 27

Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280 (1914) 16, 17

Bonner v. Union Pacific R. Co., No. CV03–134–S, 2005 WL 1593635 (D. Ida. July 6, 2005) 23

Buckman v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) 13, 18

Carrillo v. ACF Ind., Inc., 20 Cal. 4th 1158 (1999) .. 26, 27

Carter v. Consolidated Rail Corp., 126 Ohio App. 3d 177, *appeal denied*, 82 Ohio St. 3d 1413 (1998) 12

Central of Georgia R. Co. v. Markert, 200 Ga. App. 851, *cert. denied*, 200 Ga. App. 895 (1991) 12

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 13, 18

Cited Authorities

Page

Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983) 11

Darby v. A–Best Prods. Co., 102 Ohio St. 3d 410 (2004), *cert. denied*, 543 U.S. 1146 (2005) 6, 11, 12, 13-14, 18

Deans v. CSX Transp., Inc., 152 F.3d 326 (4th Cir. 1998) 27

Eldridge v. Missouri Pacific R. Co., 832 F. Supp. 328 (E.D. Okla. 1993) 12

English v. General Electric Co., 496 U.S. 72 (1990) 14, 18

Engvall v. Soo Line R. Co., 632 N.W.2d 560 (Minn. 2001) 21, 22, 23, 24

Estes v. Southern Pacific Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 27

First Security Bank v. Union Pacific R. Co., 152 F.3d 877 (8th Cir. 1998) 11, 20

Forrester v. American Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 10-11, 20

Cited Authorities

Page

Furlough v. Union Pacific R. Co., 766 So. 2d 751 (La. App. 2000), *writ denied*, 781 So. 2d 556 (La. 2001) 12

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 18

General Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) 11, 12, 14

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 14, 15, 16, 17

Hines v. Davidowitz, 312 U.S. 52 (1941) 18

Illinois Cent. R. Co. v. Pub. Util. Comm'n, 245 U.S. 493 (1918) 16

In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) 12

In re Train Collision at Gary, Indiana, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom. Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997) 6, 12

Cited Authorities

Page

In re West Virginia Asbestos Litigation, 215 W. Va. 39 (2003) ..... *passim*

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 28

Key v. Norfolk Southern Ry. Co., 228 Ga. App. 305 (1997) 12

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) ..... *passim*

Lorincie v. Southeastern Pennsylvania Transp. Auth., 34 F. Supp. 2d 929 (E.D. Pa. 1998) 12, 13, 14

Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Ry., 182 Minn. 362 (1931) 23, 24

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 7, 11, 20

Mickleson v. Montana Rail Link, Inc., 999 P.2d 985 (Mont. 2000) 11

Missouri Pacific R. Co. v. Railroad Comm'n of Texas, 833 F.2d 570 (5th Cir. 1987) 11

Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934) 14, 15

Cited Authorities

Page

Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926) ..... *passim*

Nash v. Florida Ind. Comm'n, 389 U.S. 235 (1967) 28

New York Central R. Co. v. Winfield, 244 U.S. 147 (1917) 16

Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003) 20, 21, 23

Norfolk Southern Ry. Co. v. Denson, 774 So. 2d 549 (Ala. 2000) 11

Oglesby v. Delaware & Hudson Ry. Co., 964 F. Supp. 57 (N.D.N.Y. 1997), *rev'd*, 180 F.3d 458 (2nd Cir. 1999) 14

Oglesby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2nd Cir. 1999), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1094 (1999) 6, 11, 14, 27

Pennsylvania R. v. Pub. Service Comm'n, 250 U.S. 566 (1919) 8

Phillips v. CSX Transp., Inc., 190 F.3d 285 (4th Cir. 1999) 26-27

Cited Authorities

Page

Pinkham v. Maine Central R. Co., 874 F.2d 875 (1st Cir. 1989) 27

Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957) 19

Roth v. I&M Rail Link, L.L.C., 179 F. Supp. 2d 1054 (S.D. Iowa 2001) 12, 14, 23

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 5, 11, 18

Scheiding v. General Motors Corp., 22 Cal. 4th 471, *cert. denied*, 531 U.S. 958 (2000) .....*passim*

Seaman v. A.P. Green Ind., Inc., 184 Misc. 2d 603 (N.Y. Sup. Ct. 2000) 12, 25

Silkwood v. Kerr–McGee Corp., 464 U.S. 238 (1984) 14, 18

Southern Ry. Co. v. Lunsford, 297 U.S. 398 (1936) 26

Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993) ...19-20

Springston v. Consolidated Rail Corp., 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) 6, 8-9, 11, 20

Cited Authorities

Page

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Taylor AG Ind. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 26

Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33 (1916) 14, 15

Trinidad v. Southern Pacific Transp. Co., 949 F.2d 187 (5th Cir. 1991) 27

Union Pacific R. Co. v. Motive Equip., Inc., 714 N.W.2d 232 (Ct. App. Wis. 2006) 23

United States v. Locke, 529 U.S. 89 (2000) 13

United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000) 11

United Transp. Union v. Long Island R. Co., 455 U.S. 678 (1982) 9

Urie v. Thompson, 337 U.S. 163 (1949) 15

Page

Varney v. Norfolk & Western Ry. Co., 899 F. Supp. 280 (S.D.W. Va. 1995) 27

Viad Corp v. Superior Court, 64 Cal. Rptr. 2d 136 (Ct. App. 1997) 14

Vorhees v. Naper Aero Club, Inc., 272 F.3d 398 (7th Cir. 2001) 22

Xerox Corp. v. County of Harris, Texas, 459 U.S. 145 (1982) 28

STATUTES, RULES, AND REGULATIONS:

Atomic Energy Act 18

Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966) 7

Federal Aviation Act 22

Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* .....*passim*

Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 *et seq.* 2, 3, 9

Locomotive Boiler Inspection Act (BIA, LIA, FLIA, LBIA), 49 U.S.C. § 20701 *et seq.* .....*passim*

Cited Authorities

Page

Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 103-365, § 10, 106 Stat. 972 (1992) 24

Revision of Title 49, Transportation, U.S.C., Pub. L. No. 103-272, §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180 (1994), reprinted in 1994 U.S.C.C.A.N. 818 9

Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.* .....*passim*

28 U.S.C. § 1257(a) 1

H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104 9

Sup. Ct. R. 14.1(g)(i) 23

Sup. Ct. R. 29.6 ii

49 C.F.R. § 1.49(c)(5), (g) (2004) 7

49 C.F.R. § 229.9(a), (b)(2) 28

Page

OTHER AUTHORITIES:

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10,583 (March 10, 1978) 10

FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* (Sept. 1996) 23-24

14B Wright, Miller and Cooper, *Federal Practice and Procedure* § 3722.1 (3rd ed.) 22

TABLE OF APPENDICES

Page

Appendix A — Appellees' Petition For Rehearing In The Supreme Court Of Appeals Of West Virginia 1a

Appendix B — Order Of The Supreme Court Of Appeals For The State Of West Virginia Denying Petition For Rehearing Dated January 15, 2004 ... 4a

Appendix C — Excerpts From Department Of Transportation Policy Statement 5a

Appendix D — Report To Congress Of The U.S. Department Of Transportation Dated September 1996 ..... 7a

JURISDICTION

This Court can have jurisdiction under 28 U.S.C. § 1257(a) only if it treats the within petition as directed to the Circuit Court of Kanawha County rather than, as styled by petitioners, to the West Virginia Supreme Court of Appeals, as it is evident that "the highest court . . . in which a decision could be had" was the Circuit Court.[1]

STATEMENT OF THE CASE

Petitioners' Statement of the Case misstates two of the three questions certified to the West Virginia Supreme Court of Appeals, and distorts and omits procedural history relevant to certain of petitioners' legal arguments.

Petitioners and others allegedly similarly situated commenced mass asbestos litigation in West Virginia asserting, *inter alia*, state-law product defect and failure to warn claims against certain defendant manufacturers, distributors, and suppliers of locomotives and locomotive and railcar parts for purported injuries resulting from alleged exposure to asbestos-containing products. Some defendants, including respondent Old Orchard Industrial Corp., the successor to Vapor Corp, a manufacturer of locomotives and locomotive parts[2], moved for summary judgment on the ground that the Boiler Inspection Act (BIA)[3] preempted petitioners' claims; other defendants,

[1] The petition should nevertheless be dismissed for lack of jurisdiction because the decision below is not final under 28 U.S.C. § 1257(a) inasmuch as it does not conclude the litigation as to all causes of action and all parties.

[2] Respondents Viad Corp and General Motors Corp., likewise manufacturers of locomotives and locomotive parts, were not parties to the litigation at that time.

[3] The BIA is now called the Locomotive Inspection Act (LIA) and is also referred to in some court decisions as the FLIA or LBIA. It is referred to herein as the BIA.

which manufactured and supplied brakes for both locomotives and railcars, filed summary judgment motions on preemption grounds pursuant to the Safety Appliance Act (SAA) and the Federal Railroad Safety Act (FRSA) as well as the BIA.

The motions were denied; however, the Kanawha County Circuit Court certified the following three questions – two of which petitioners misquote in their petition (Pet. 1) – to the West Virginia Supreme Court of Appeals:

> 1. Are state tort claims against manufacturers of parts or components of trains, locomotives, railcars, and similar vehicles used on any railroad, which is engaged in interstate or foreign commerce, preempted by federal law under the Safety Appliance Act, 49 U.S.C. § 20301 *et seq.*?
>
> 2. Are state tort law claims against manufacturers of parts or components of trains, locomotives, railcars, and similar vehicles used on any railroad, which is engaged in interstate or foreign commerce, preempted by federal law under the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*?
>
> 3. Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*?

Following the West Virginia Supreme Court's grant of review, respondent Viad was permitted to intervene as a party appellant and participated fully thereafter in the briefing and argument of the appeal along with Old Orchard and the two brake manufacturers. Ultimately, the West Virginia Supreme Court answered the third question – implicating only the BIA – in the affirmative, holding that "[b]ecause this finding makes

consideration of the first two questions unnecessary, we decline to answer them." *In re West Virginia Asbestos Litigation*, 215 W. Va. 39, 41 (2003). Petitioners then filed an application for rehearing, agreeing that only the third certified question needed to be answered "with regards to the LBIA [defendants] Vapor[4] and Viad" but arguing that such was not the case as to the brake manufacturers (neither of which is a respondent herein).[5] Respondent's Appendix A, page 2a. Petitioners thus conceded that consideration only of the BIA – not the SAA or the FRSA – was required to determine whether petitioners' claims against Vapor and Viad were preempted.

The application for a rehearing was denied as to all parties. Respondent's Appendix B. Subsequently, respondent Viad's motion for summary judgment was granted by the Kanawha County Circuit Court in reliance on the holding in *In re West Virginia Asbestos Litigation* and judgment entered in its favor on July 27, 2005.[6] Petitioners' Appendix A. On March 15, 2006,

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[4] *i.e.*, Old Orchard.

[5] Petitioners explained: "Vapor and Viad (or their predecessors) manufactured locomotive and/or locomotive components that contained asbestos. The other two [defendants], Railroad Friction Products Corporation (RRFPC) and American Standard, Inc. (ASI) manufactured and supplied rail car and locomotive brakes which at certain times in the past contained asbestos. . . . ¶Vapor moved for summary judgment on the claims below solely on the basis of the [BIA] . . . as that act is germane only to locomotives. . . . RRFPC and ASI, on the other hand, moved for summary judgment on the claims below on the basis of **both** the [BIA] and the [SAA] . . . as those companies made or distributed a product that was used both on locomotives and rail cars" (emphasis in original). Respondent's Appendix A, pages 1a-2a.

[6] The motions of respondents Old Orchard and General Motors, which had by then become a party to the West Virginia asbestos litigation, were also granted. The Circuit Court held in part in its two orders that:

(Cont'd)

the West Virginia Supreme Court denied the petition seeking leave to appeal from the Circuit Court's final judgment. Petitioners' Appendix B.

SUMMARY OF ARGUMENT

There is no issue that warrants this Court's review. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), holds that the BIA, now codified at 49 U.S.C. §§ 20701-20903 (1994), occupies the field of all matters "within the scope of the authority delegated to the [Interstate Commerce] Commission" – now the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive," *i.e.*, the "entire locomotive . . . and all parts and appurtenances thereof." *Id.* at 608, 611, 613. The BIA therefore preempts all state law – including common-law tort claims against locomotive equipment manufacturers – in the field, as it must. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines or conform to the rule of the most exacting state, a burden Congress deemed intolerable.

Napier disposes of the case at bar. Petitioners' state-law claims attack the locomotive "design" that called for asbestos, the "construction" that used it, and the "materials" themselves,

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(Cont'd)

"(1) The parties agree that the claims asserted against [respondents] are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by [respondents]"; "(2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the [BIA]. . ."; and "(4) Each and every individual claim asserted against . . . Vapor and Viad in the . . . consolidated civil action" and "[a]ll of the claims asserted against GM in each and every one of these civil actions are preempted by federal law under the [BIA]. . . ." Petitioners' Appendix A.

and petitioners do not claim otherwise. They accordingly fall squarely within the Secretary's authority and so, the West Virginia Supreme Court and Kanawha County Circuit Court properly held, within the preempted field.

That is true whether the state law under which the duty is imposed is common-law or not, and is also true whether the claim is made against the railroad operator or the locomotive manufacturer. It has been settled for 45 years that tort claims are designed to regulate and affect conduct in the same manner as statutes and regulations, and so tort claims are preempted just as statutes and regulations are. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Moreover, the BIA speaks to "manufacturer[s] . . . of railroad equipment"; thus, the manufacturers that design and construct locomotives and their parts are necessarily at the center of that field and, as a practical matter, state law imposing duties on manufacturers must be preempted, lest the uniformity required by federal law be destroyed.

The petition therefore presents no issue meriting the exercise of this Court's certiorari jurisdiction. The decision of the Kanawha Circuit Court following that of the West Virginia Supreme Court in *In re West Virginia Asbestos Litigation* does not conflict with a decision of this Court or of any federal or state appellate court. Four circuit courts – the Ninth, Eighth, Sixth, and Second Circuits – and three state supreme courts – Alabama, California, and Ohio – have previously considered the precise question presented here, *see infra* at pp. 10-12, and all reached the identical conclusion: state common-law tort claims against locomotive manufacturers are preempted by the BIA pursuant to *Napier*. Moreover, the state cases all concerned asbestos. So settled is the preemptive scope of the BIA as to

petitioners' claims that this Court has denied certiorari to review the decisions of four of these courts – the Second Circuit in *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir. 1999), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); the Sixth Circuit in *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); the Ohio Supreme Court in *Darby v. A-Best Prods. Co.*, 102 Ohio St. 3d 410 (2004), *cert. denied*, 543 U.S. 1146 (2005)[7]; and the California Supreme Court in *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, *cert. denied*, 531 U.S. 958 (2000) – as well as the decision of the Indiana Court of Appeals in *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom. Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997).

In short, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

REASONS FOR DENYING THE PETITION

I. *Napier v. Atlantic Coast Line R. Co.*: Congress Intended Completely to Occupy the Field of Locomotives and Locomotive Parts

For 80 years, since Justice Brandeis's opinion for a unanimous Court in *Napier*, it has been settled that Congress intended the BIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce. *Id.*, 272 U.S. 605.

Napier held that Congress intended the BIA "to occupy the field" in respect to all areas subject to the BIA, and that the BIA

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[7] *Darby*, where this Court most recently denied certiorari, relied in considerable part on *In re West Virginia Asbestos Litigation.*

accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission – whose successor is the Secretary of Transportation, via the Federal Railroad Administration[8] (FRA). *Id.* at 611, 613. Those areas encompass "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court found that the BIA conferred on the Commission "general" power to regulate locomotive safety equipment and that the BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there was any applicable federal rule at all:

> **It is also urged that, even if the Commission has power to prescribe** an automatic fire box door and a cab curtain, **it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating power. We hold that state legislation is precluded, because the Boiler

[8] In 1966 the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g) (2004).

> Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

Napier, 272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Congress preempted the field for good reason. Locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
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> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress' goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997) (Kozinski, J.) (citation omitted); *accord Springston*, 130

F.3d at 245; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd*, 364 F.2d 241 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967); *Scheiding*, 22 Cal. 4th at 483.

Petitioners suggest (Pet. 13-14) that *Law* misapplied federal preemption principles by examining the effect of state regulations on the federal goal. This type of analysis, petitioners claim, "does not properly belong to the doctrine of field preemption" but, rather, to that of conflict preemption. *Law*, however, got the preemption analysis exactly right, merely explaining the self-evident and practical reason Congress intended the BIA to occupy the field and displace all state law. *See, e.g., United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687-88 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. . . . Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system."). Indeed, Congress itself, long before *Law*, articulated the importance of uniform, federal laws relating to railroad safety: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106 (FRSA).[9] So too did the FRA:

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[9] In enacting the FRSA, 49 U.S.C. § 20101 *et seq.*, in 1970, Congress reaffirmed that under the BIA, and five other laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field"; Congress stated in 1970 that these laws "have served well" and "chose to continue [them] without change." H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105, 4108. In recodifying the BIA and other transportation laws in 1994 without substantive change, Congress expressly preserved "the precedent value of earlier judicial decisions," such as *Napier*. Revision of Title 49, Transportation, U.S.C., Pub. L. No. 103-272, §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180, at 3, 5 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 820, 822.

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10,583, 10,585-86 (March 10, 1978). Respondent's Appendix C.

II. An "Avalanche" of Federal and State Appellate Case Law Holds that the BIA Preempts Common-Law Claims Against Locomotive Manufacturers

The West Virginia Supreme Court of Appeals correctly held that, through the BIA, Congress "occupied the field of railroad safety so pervasively" that "any other path" was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." *In re West Virginia Asbestos Litigation*, 215 W. Va. at 43. Accordingly, the Kanawha Circuit Court's decision granting summary judgment in reliance upon this holding is unassailable.

A nearly unbroken line of federal and state appellate authorities follow *Napier* without exception and hold that the BIA preempts state common-law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts – the field the BIA occupies. *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of

locomotive cranes); *Law, supra* (9th Cir.) (quoting *Garmon;* BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *Marshall, supra* (9th Cir.) (BIA preempts common-law claims for failure to install warning devices on locomotive) (Kennedy, J.); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common-law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston, supra* (6th Cir.) (BIA preempts common-law claims against manufacturer); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (BIA preempts state statute requiring locomotive speed indicators); *Oglesby, supra* (2nd Cir.) (BIA preempts employee common-law claims against locomotive seat manufacturer); *General Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (BIA preempts state-law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Scheiding, supra* (Cal.) (BIA preempts railroad workers' tort claims against manufacturer for asbestos-related injuries); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *Darby, supra* (Ohio) (BIA preempts railroad workers' asbestos claims against locomotive manufacturers); *In re West Virginia Asbestos Litigation, supra* (W. Va.) (BIA preempts state tort law claims

against manufacturers of locomotives and asbestos-containing parts and components thereof).[10]

Astoundingly, petitioners virtually ignore this overwhelming authority and instead devote nearly two pages (Pet. 11-13) to a discussion of one anomalous case, *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929 (E.D. Pa. 1998), which, according to petitioners, properly declined to "broadly stretch the preemption umbrella of the LBIA to cover actions against [manufacturers]" given the "requirement that Congress's intent to preempt state police powers be 'clear and manifest,' and the strong presumption against preemption in the area of health and safety." Pet. 13.

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[10] *See also Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305 (1997) (BIA preempts common-law claims against railroad by employee injured in fall from locomotive steps); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, *cert. denied*, 200 Ga. App. 895 (1991) (same); *Dillon (In re Train Collision), supra* (Ind. App.) (BIA preempts common-law claims against manufacturer); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751 (La. App. 2000), *writ denied*, 781 So. 2d 556 (La. 2001) (BIA preempts negligence claim based on inoperative ditch lights); *Carter v. Consolidated Rail Corp.*, 126 Ohio App. 3d 177, *appeal denied*, 82 Ohio St. 3d 1413 (1998) (BIA preempts common-law claims arising from alleged asbestos exposure); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common-law negligence and design defect claims against manufacturer); *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state common-law tort claims against manufacturer in action brought by widow of employee crushed in collision); *Eldridge v. Missouri Pacific R. Co.*, 832 F. Supp. 328 (E.D. Okla. 1993) (BIA preempts negligence claim based on inadequate locomotive warning devices); *Seaman v. A.P. Green Ind., Inc.*, 184 Misc. 2d 603 (N.Y. Sup. Ct. 2000) (cited by the West Virginia Supreme Court in the case at bar, and in *Darby* and *Kilgore*; BIA preempts common-law asbestos claims against manufacturer).

Petitioners' reliance on *Lorincie* is misplaced for a number of reasons. First, this Court has unequivocally held that there is no "'assumption' of nonpre-emption . . . when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Thus, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" (*id.*), and respondents need not "overcome the 'strong presumption'" that petitioners' claims fall outside the preempted field.[11] Second, Congress's "clear and manifest" intent to occupy the field – "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part" – and preempt state police powers has been well established since *Napier*. *Scheiding*, 22 Cal. 4th at 475, 482; *see also Darby*, 102 Ohio St. 3d at 418; *Law*, 114 F.3d at 913 ("Through the BIA, the federal government has established a comprehensive, national regime of locomotive

[11] In addition to *Lorincie*, petitioners (Pet. 9) cite *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), for this presumption. But *Cipollone* concerned "'smoking and health' . . . with regard to cigarette labeling," *id.* at 518, a subject traditionally of state rather than national interest. To the contrary, *Napier* itself establishes that the BIA preempts health and safety laws with respect to locomotives and their parts – historically a federal concern. The states therein defended their laws on the ground that they sought to "prevent sickness and disease." *Id.*, 272 U.S. at 612. But this Court held they were preempted "however commendable or however different their purpose." *Id.* at 611-13. In other words, because locomotive regulation is historically a federal field, no presumption against preemption exists merely because petitioners claim personal injury. *See, e.g., Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-48 (2001) (no presumption against preemption of personal injury claim said to stem from fraud on federal agency; "Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' . . . 'such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.'") (citations omitted).

regulation. This regime – enforced by [the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA)] and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives.").

Finally, *Lorincie* relied in substantial part on *Viad Corp v. Superior Court*, 64 Cal. Rptr. 2d 136 (Ct. App. 1997), which was thereafter expressly overruled by the California Supreme Court in *Scheiding*, and on *Oglesby v. Delaware & Hudson Ry. Co.*, 964 F. Supp. 57 (N.D.N.Y. 1997), which was thereafter reversed by the Second Circuit. *Lorincie* was expressly rejected by the Second Circuit in *Oglesby*, 180 F.3d at 462, and has not been favorably cited in any reported decision. Indeed, every reported case to consider *Lorincie* has rejected it. *Oglesby*, 180 F.3d at 462; *Roth*, 179 F. Supp. 2d at 1061; *Kilgore*, 853 So. 2d at 176.

III. *In re West Virginia Asbestos Litigation* Does Not Conflict With Decisions of This Court

Petitioners contend (Pet. 3-8) that the West Virginia Supreme Court's decision upon which the Kanawha Circuit Court relied in granting summary judgment "directly conflicts" with this Court's decisions in two respects: first, as to the scope of SAA and BIA preemption under *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916), *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934), and *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), and second, as to the nature of federal preemption generally under *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990).

Petitioners begin their first argument by wrongly conflating the SAA and the BIA – "Any analysis regarding the scope of the federal preemption under the LBIA must necessarily begin

with a discussion of the history of [the SAA]" (Pet. 4); "Taken as a whole, [this Court's] decisions in *Napier*, *Moore*, and *Gilvary* clearly define the scope of preemption under the LBIA and SAA" (Pet. 6) – and then undertaking an analysis of the **SAA** under *Rigsby*, *Moore* and *Gilvary* and erroneously concluding that the **BIA** does not preempt their claims. The purported logic of petitioners' argument is that: (1) although the BIA and SAA must be read *in pari materia* with FELA, the SAA was enacted first, before the BIA and FELA[12]; (2) the SAA prescribed the duty or standard of care in the field of railroad safety but did not set forth rules governing the enforcement of any rights, leaving common-law actions intact; (3) *Gilvary*, decided after *Napier*, held that the SAA did not preempt state workers' compensation laws; (4) *ergo*, the scope of preemption under the SAA and, somehow, under the BIA "is limited to the establishment of standards, and does not foreclose actions . . . by railroaders and passengers . . . to the extent [such actions] do not seek to impose a standard different from, or which in any manner conflicts with, the standards imposed by Congress through the LBIA and the SAA." Pet. 6.

To the contrary, the language of *Gilvary* clearly shows that this Court's citation of *Napier* was intended to **contrast** the SAA and the BIA in effect in 1911 from the BIA as amended in

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[12] The BIA and SAA are considered amendments to the FELA. *Urie v. Thompson*, 337 U.S. 163, 189 (1949) ("the [SAA], together with the [BIA] are substantively if not in form amendments to the [FELA]. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law. Thus taken, as has been the consistent practice, the [BIA] and [SAA] cannot be regarded as statutes wholly separate from and independent of the [FELA]. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible.").

1924 and construed in *Napier*. What the Court stated in *Gilvary* was this:

> The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line v. Georgia*, 234 U.S. 280 [1914]. . . . ***Cf.*** *Napier v. Atlantic Coast Line*. . . . The purpose exclusively to regulate need not be specifically declared. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 [1917]. . . . But ordinarily such intention will not be implied unless, when fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter. *Illinois Cent. R.R. Co. v. Public Utilities Comm.*, 245 U.S. 493 [1918].

Gilvary, 292 U.S. at 60 (emphasis added).

The comparison the Court invites in *Gilvary* between *Atlantic Coast Line R. Co. v. Georgia*, from 1914, and *Napier*, from 1926, shows that what the Court was driving at in *Gilvary* is entirely different from what petitioners herein urge the case means. The 1914 case concerned lights in a locomotive, and the Court held that the SAA and the BIA as then in effect included no explicit regulation of such lights, so the states were free to adopt their own. But the BIA was thereafter amended, and here is what this Court had to say on the issue in *Napier*:

> Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to

> the boiler. *Atlantic Coast Line R. Co. v. Georgia.* . . . But the power delegated to the Commission by the Boiler Inspection Act **as amended** is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.

Napier, 272 U.S. at 611 (emphasis added). Obviously, then, just as this Court in *Napier* contrasted the rule applicable to *Atlantic Coast Line R. Co. v. Georgia* with that applicable to *Napier*, so did the Court in *Gilvary*. In fact, the language of *Gilvary* citing *Napier* stands for exactly the opposite proposition from that for which petitioners cite it.

Indeed, if petitioners' thesis were true, and over 80 years of precedent had erroneously interpreted the scope of preemption under the BIA, this Court surely would not have declined the opportunity to correct that error by denying certiorari **five** times in the past nine years. Instead, this Court has implicitly, and repeatedly, reconfirmed the correctness of over two dozen federal and state appellate court decisions applying *Napier* and finding that the BIA preempts state common-law tort claims.

Petitioners' reasoning is not only incorrect, it is irrelevant. This is a BIA case, not an SAA case. The SAA grants federal regulatory authority over specific parts of locomotive railcars such as automatic couplers, hand brakes, sill steps, ladders, grab irons, handholds, and running boards[13]; the BIA, however, grants authority over the **entire** locomotive. Because the BIA preempts petitioners' claims (*see* pp. 6-12, *supra*), the SAA is beside the point, as the West Virginia Supreme Court of Appeals – **and petitioners themselves**, in their application for rehearing (*see* p. 3 and footnote 5, *supra*) – properly concluded.

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[13] The SAA is now codified at 49 U.S.C. §§ 20301-20306 (1994).

Petitioners' second argument (Pet. 6-9), pursuant to *Silkwood* and *English*, likewise fails. Far from being "remarkably analogous to the situation which is currently before this Court" (Pet. 7), *Silkwood* found no congressional intent to preclude an award of punitive damages under the Atomic Energy Act in light of the overall statutory scheme. *Id.*, 464 U.S. at 250-55. By contrast, *Napier* long ago established that "Congress indeed manifested the intention to 'occupy the entire field of regulating locomotive equipment.'" *Darby*, 102 Ohio St. 3d at 418; *Scheiding*, 22 Cal. 4th at 481. Petitioners reject this clear distinction and instead maintain that "a court must still scrutinize the individual nature of the claims at issue to determine whether or not they frustrate the federal objective and fall within the preempted field." Pet. 7. However, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood*, 464 U.S. at 248. Thus, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from the field, so any state law in the field, including petitioners' common-law claims, necessarily "frustrate[s] the federal objective" and conflicts with that intent, and is therefore preempted. *English*, 496 U.S. at 79-80 n.5.[14]

The California Supreme Court explained it best:

> [U]nlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort

[14] *See also Cipollone*, 505 U.S. at 521 (quoting *Garmon*, 359 U.S. at 246-47). This Court has repeatedly held since *English* that ordinary preemption principles apply to common-law damage actions. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-69, 874 (2000) (products liability claim preempted; "ordinary pre-emption principles, grounded in longstanding precedent" dating back at least to *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), will continue to be applied in determining whether or not there is "pre-emption of state tort suits"); *Buckman*, 531 U.S. at 352 (common-law claim for personal injuries preempted; "ordinary" preemption principles applied).

> recovery. That is, the BIA cannot remove "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material. Any other result would place regulation of these in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity.

Scheiding, 22 Cal. 4th at 480.

IV. Petitioners Have a Potent Remedy Under FELA

Petitioners' contention (Pet. 14-15) that preemption of their state tort claims "ignores a number of factual scenarios in which a plaintiff will not have any other avenue of recovery available to him" is not an issue in this case. Petitioners are all current or former railroad employees, and so eligible to bring FELA claims against their former employers. *See In re West Virginia Asbestos Litigation*, 215 W. Va. at 43 n.2 ("the arguments of counsel lead us to believe . . . that all the plaintiffs have a remedy against the railroads under the Federal Employers' Liability Act. . ."). "This remedy is strong medicine." *Law*, 114 F.3d at 912. Under it, a worker may recover the same compensatory damages as are available at common law where "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). FELA demonstrates how Congress intended railroad workers injured on the job would be compensated, and shows why its decision to preempt is sensible.

In any event, petitioners' argument goes nowhere. Federal law occupies the field and alone can impose duties. *See Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993) ("Once Congress

has chosen to preempt the state claim, it's free to give affected individuals a full federal claim, a claim providing only for remedies limited to equity, a damages claim only, **or no claim at all**.") (emphasis added).[15]

As to petitioners' other contention (Pet. 15-16), regarding contribution and indemnification claims by common carriers, *Norfolk & Western Ry. Co. v. Ayers*, *supra*, provides no support for petitioners' position that railroad workers should be able to pursue direct actions against locomotive manufacturers for "LBIA liability." Indeed, this Court unequivocally demonstrated the lack of need for such a remedy, and the rationale behind the absence thereof, by reiterating in *Ayers* that "the FELA does not authorize apportionment of damages between railroad and nonrailroad causes." *Id.*, 538 U.S. at 159-60. That is to say, FELA defendant railroads are 100 percent liable to their employees, although the railroads, in turn, "may bring

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[15] Thus, in *Forrester*, 255 F.3d at 1209-10, the Ninth Circuit expressly rejected the plaintiff's argument "that *Law* preempts only claims by railroad employees, not persons who have no remedy under the [FELA]." *Forrester* observed that *Marshall*, *First Security*, and *Springston* all had previously "held a common-law claim of a motorist against a railroad arising out of a crossing accident, to the extent it was based on the railroad's inadequate warning devices, [to be] preempted by the Act." *Id.* Accordingly, even as against railroads, all common-law claims within the preempted field are barred by the BIA; and only railroad workers can obtain BIA relief under FELA. There is therefore nothing particularly remarkable about the determination that, because of BIA field preemption, all common-law claims of whatever nature against locomotive manufacturers – which are not subject to FELA – should likewise be barred. In sum, railroad workers have a statutory remedy, but only against their employers, which are 100 percent liable through FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-66 (2003). For all others – such as passengers, motorists, and bystanders – BIA field preemption simply precludes all remedies against both railroads and manufacturers.

indemnification and contribution actions against third parties. . . ." *Id.* at 162. This is a clear statement that, pursuant to the FELA statutory scheme, railroad employees are required to seek their damages from their railroad employers.[16]

V. Decisions by the Seventh Circuit Court of Appeals and the Minnesota Supreme Court Do Not Undercut the Avalanche of Authority Foreclosing Petitioners' State Tort Claims

Petitioners (Pet. 18-19) cite two BIA cases – *Adkins v. Illinois Central R. Co.*, 326 F.3d 828 (7th Cir. 2003), and *Engvall v. Soo Line R. Co.*, 632 N.W.2d 560 (Minn. 2001) – which they argue are in "direct conflict" with the West Virginia Supreme Court. *Adkins*, however, is irrelevant, and *Engvall*, although wrongly decided, actually bars petitioners' state-law claims.

Adkins appears to have conflated field preemption, which is a defense that can be raised whether the case is pending in federal or state court, with complete preemption, which is a doctrine governing the removal of cases from state to federal court. The only issue in *Adkins* was whether the action, brought under the BIA through FELA, was properly removed on the ground that Congress "clearly intended completely to replace state law with federal law and create a federal forum" at the

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[16] *Ayers* holds both that the railroad employee has rights only against his employer the railroad and that the railroad may bring indemnification and contribution actions against third parties (such as manufacturers) only where such a right is provided under an "**otherwise applicable** state or federal law" (emphasis added). *Id.* This language begs the question before the Court. Inasmuch as BIA field preemption bars all suits against manufacturers relating to locomotive equipment, parts, and materials, perforce no law permitting indemnification or contribution is "otherwise applicable." Accordingly, *Ayers* certainly gives the injured employee no right of action against the manufacturer in such a case.

same time. *Id.* at 835, quoting *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001). Inasmuch as it is plain that a BIA claim can be brought only through FELA, under which there is concurrent federal and state-court subject-matter jurisdiction, the Seventh Circuit's decision in *Adkins* cannot fairly be understood as undercutting *Napier* or any of the other federal or state appellate decisions – none of which the Seventh Circuit discusses or even cites – that have consistently upheld the defense of BIA field preemption.

Indeed, unlike *Adkins*, *Vorhees* – written by the same circuit judge – clearly sets forth the difference between "complete" and other forms of preemption: "[T]he fact that a federal statute creates a defense to a state law claim does not necessarily mean that 'Congress has, by statute, taken the subject away from state tribunals and given it to federal courts.' . . . The question is whether, in enacting the Federal Aviation Act, Congress clearly intended completely to replace state law with federal law and create a federal forum, or, more likely, if it only intended to provide a federal defense to the application of state law." (Citations omitted.) *Id.* at 403. As Wright, Miller and Cooper explains, the "complete-preemption doctrine, which has been invoked in a significant – and ever-increasing – number of cases and contexts," has nothing to do with "the defense of federal preemption" as such but instead concerns the "removal to federal court" of "a narrow class of claims," even if framed by a "well-pleaded complaint" as "based solely on state law." 14B Wright, Miller and Cooper, *Federal Practice and Procedure* § 3722.1 (3rd ed.), "Cases Based on the Existence of a Federal Question: Complete Preemption." The rule of complete preemption – and thus the *Adkins* decision – is irrelevant to the case at bar.

Likewise unhelpful to petitioners, *Engvall* actually agrees with all of the other federal and state cases holding "that the field preempted by the LIA includes all state law respecting the

design, construction, or material of locomotives" and that "claims seeking to impose a state law standard of care on a manufacturer (or a railroad) are preempted" by the BIA. *Id.* at 569-71. But then *Engvall*, sidestepping field preemption, postulates the existence of a right of action under state common law for violating a federal standard of care under the BIA.[17] Among other errors, *Engvall* fails to consider that there is no basis in law for asserting a private right of action against a manufacturer – in that case, General Motors – for violating a BIA standard. Both the outcome and the reasoning of *Engvall* were expressly rejected in *Roth*, *supra*, as well as in *Union Pacific R. Co. v. Motive Equip., Inc.*, 714 N.W.2d 232, 236 (Ct. App. Wis. 2006), and *Bonner v. Union Pacific R. Co.*, No. CV03-134-S, 2005 WL 1593635, at *9-10 (D. Ida. July 6, 2005).[18]

In any event, *Engvall* does not assist petitioners in their assertion that asbestos tort claims can proceed against Viad under the BIA's federal standard of care. In *Engvall*, the Minnesota Supreme Court, construing its own holding in *Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 182 Minn. 362 (1931), held that "when the FRA has found a particular design of a part or appurtenance to be safe to operate as required by the LIA, a jury cannot find otherwise." *Engvall*, 632 N.W.2d at 567. That is exactly the case here, where the FRA's September 1996

[17] Petitioners' *Engvall* argument in this Court, that they might have a claim based on violation of the BIA itself, was neither properly raised nor passed on below. *See* Rule 14.1(g)(i).

[18] That *Ayers* cites *Engvall* in a footnote (Pet. 15-16) is of no moment. The reference, *Ayers*, 538 U.S. at 162 n.21, is merely a string citation collecting cases mentioned in an A.L.R.3d article and supplement – also cited in the footnote – authorizing separate suits for contribution by railroad FELA defendants. The mere inclusion of *Engvall* in this string cite cannot reasonably be read as this Court's imprimatur for the correctness of the Minnesota Supreme Court's holding under the BIA.

Report to Congress, mandated by a 1992 federal statute[19], found unequivocally that no asbestos regulations should be prescribed "to improve the safety and working conditions of locomotive cabs" because the presence of asbestos in older locomotives still on line posed no safety hazard to humans or the environment. *Report to Congress, Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9. Respondent's Appendix D, page 11a. In the face of this FRA "on-point" determination that "locomotive components" containing asbestos are "safe to operate as required by the LIA," "a jury cannot find otherwise." *Engvall*, 632 N.W.2d at 567. For "a jury cannot be permitted to substitute its judgment in lieu of the judgment of the Commission, upon whom the law places the responsibility for such determination." *Mahutga*, 182 Minn. at 366. Accordingly, even if petitioners were correct in their general contention that state tort claims can be brought using BIA standards of care, such an approach would be barred insofar as asbestos in locomotives is concerned.

VI. The BIA Applies to Locomotives Whether They Are "On Line" or "Off Line"

Petitioners argue (Pet. 16-18) that the BIA is inapplicable because they allegedly were exposed to asbestos-containing products in connection with locomotives that were "off line." This proposition confuses two very different concepts under the BIA; the first of these is absolute liability, the second is field preemption. The decisions petitioners cite – all of which discuss only the first issue – have no bearing on the second. What these cases hold is that, under FELA, injuries from locomotives not "in use" are not subject to the BIA's absolute liability standard. But this concept has absolutely nothing to do with the question of whether, under the BIA, state common-

[19] *See* Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 103-365, § 10, 106 Stat. 972 (1992).

law tort law is preempted and, for railroad workers, replaced by FELA.

Petitioners' argument is wrong on at least five counts:

(i) The federal field is defined not by **where** the regulation is applied but by **what** is regulated – the physical "object" of it. *Napier*, 272 U.S. at 611-13. The physical object of petitioners' claimed common-law rule is the locomotive and the design, construction, and material of its parts. Therefore, state regulation is preempted. *Id.*

(ii) Petitioners' premise is that a state can regulate a locomotive's design, construction, parts, or materials when the locomotive is being repaired off line, but not when it is in operation on line. That argument is metaphysical. A locomotive's design, parts, construction, and materials are the same on line or off.[20] Indeed, the job of off-line roundhouses is to put the locomotive and its on-line parts in condition to operate on line. Perhaps petitioners' thesis is that railroads must replace federally lawful on-line parts with state-lawful off-line parts while the parts are being repaired, and then replace the state-lawful off-line parts with the federally sanctioned on-line parts after the parts are repaired. Such a scheme is obviously utterly unworkable.

(iii) Any regulation of locomotive parts necessarily applies to the manufacturer upon delivery of the locomotive; "once they sell the train, it's out of their hands." *Law*, 114 F.3d at 912 n.3. State regulation of locomotive parts, whether applicable on line or off, would thus require the manufacturer to deliver – and,

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[20] *See Seaman*, 184 Misc. 2d at 607 (holding "irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use").

accordingly, the railroad to buy – a locomotive meeting the state regulation. That is exactly what preemption of state law forbids. *Cf. Law*, 114 F.3d at 910-11; *Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1168-69 (1999); *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) (state regulation could not regulate indirectly what it was preempted from regulating directly).

(iv) Petitioners' reasoning that the BIA applies to parts on line, but has nothing to do with the inspection and repair of them off line, is a *non sequitur*, indeed impossible. A locomotive and its parts could not meet federal standards on line if they were not inspected and repaired to be in compliance with them off line. Moreover, the FRA in fact regulates numerous off-line activities, including inspection, testing, maintenance, and repair; after all, the law is called an "Inspection Act." Indeed, the BIA commands that a locomotive not inspected, tested, and repaired while off line cannot be used at all on line. 49 U.S.C. § 20701(2).

(v) Petitioners' on-line cases are, finally, beside the point. None has anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads essentially alleging breach of the duty properly to maintain locomotives and their parts, and the issue is "at what point the railway becomes absolutely liable for injuries caused by defective equipment under the Act." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). These cases simply hold that the railroad's absolute duty to maintain under the BIA applies through FELA to the locomotive's operation on line, but not when it is in repair or at rest off line, for the very good reason that a locomotive while off line (perhaps for months) need not be in condition to operate on line. *See, e.g., Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936) (rejecting plaintiff's claim that railroad violated BIA by failing properly to maintain experimental device not "part" or "appurtenance" of locomotive); *Phillips v. CSX Transp., Inc.*, 190 F.3d 285 (4th

Cir. 1999) (FELA/SAA claims dismissed; train not "in use" at time of injury); *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir. 1998) (SAA claim reinstated because train "in use" when plaintiff released hand brake; FELA claim dismissed); *Varney v. Norfolk & Western Ry. Co.*, 899 F. Supp. 280 (S.D.W. Va. 1995) (detached radio not "part" or "appurtenance" of locomotive; BIA therefore inapplicable to plaintiff's claims); *Trinidad v. Southern Pacific Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (SAA claim dismissed; brake provisions of SAA do not apply to trains during pre-departure inspection); *Pinkham v. Maine Central R. Co.*, 874 F.2d 875 (1st Cir. 1989) (affirming directed verdict in favor of railroad on BIA claim; locomotive not "in use" at time of injury); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983) (same); *Angell, supra* (verdict in favor of plaintiff on FELA/BIA claims affirmed where train "in use" because engine had passed inspection and been "okayed" for service); *Estes v. Southern Pacific Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (affirming favorable FELA verdict and dismissal of BIA claim; locomotive not "in use" at time of injury).

In sum, petitioners' notion that states may regulate the design of locomotive parts off line would require railroads to meet conflicting state standards off and on line; or – assuming no conflict – either to meet the most stringent state regulation on and off line or not to repair locomotives needing repair in states whose most stringent off-line regulations the locomotive does not meet. Requiring locomotives to "adhere to the standard set by the most stringent state" would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169 (citations omitted); *Oglesby*, 180 F.3d at 461. Deterring railroads from repairing locomotives in any state would make no sense at all, indeed would flatly violate Congress's mandate that locomotives be maintained and

promptly repaired wherever they go.[21] That would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress," and accordingly be preempted on that ground as well. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[21] The BIA mandates repair at the first facility on the route if a locomotive falls out of compliance; otherwise, the locomotive cannot be used to haul freight. 49 C.F.R. § 229.9(a), (b)(2). A state is preempted from imposing additional requirements as the price of federally -required maintenance. *See Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 150-54 (1982) (state tax preempted because it would financially penalize acts federal law sought to foster); *Nash v. Florida Ind. Comm'n*, 389 U.S. 235, 240-41 (1967) (state law preempted because it discouraged act congressional policy sought to leave uninhibited; state cannot "retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress") (citation omitted).

APPENDIX

APPENDIX A — APPELLEES' PETITION FOR REHEARING IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS LITIGATION
CIVIL ACTION NO. 02-C-9004
KANAWHA COUNTY CIRCUIT COURT

CASE NO.: 31237

APPELLEES' PETITION FOR REHEARING

[Tables Intentionally Omitted]

I. INTRODUCTION

These cases involve the claims of thousands of railroad employees against several manufacturers of railroad car and/or locomotive components for asbestos related injuries. Two of the appellants, Vapor and Viad (or their predecessors) manufactured locomotives and/or locomotive components that contained asbestos. The other two appellants, Railroad Friction Products Corporation (RRFPC) and American Standard, Inc.(ASI) manufactured and supplied rail car and locomotive brakes which at certain times in the past contained asbestos.

Appellant Vapor moved for summary judgment on the claims below solely on the basis of the Locomotive Boiler Inspection Act (LBIA), 49 U.S.C. §§ 20701, *et seq.* as that

act is germane only to locomotives. Appellants RRFPC and ASI, on the other hand, moved for summary judgment on the claims below on the basis of **both** the LBIA and the Safety Appliance Act (SAA), 49 U.S.C. §§ 20301, *et seq.* as those companies made or distributed a product that was used both on locomotives and rail cars.

* * *

II. ARGUMENT IN SUPPORT OF PETITION.

A. The First Certified Question Should Have Been Answered, And the Answer Should Have Been in the Negative.

As indicated above, this Court determined that answering the question with regards to the LBIA in the affirmative that it was unnecessary to answer the questions with regards to the SAA and the FRSA, further holding that "[b]ecause we hold that this statute [the LBIA] preempts the plaintiffs' claims against the defendant, we need not reach the other questions presented to us, and decline to answer them." *In re*: *West Virginia Asbestos Litigation*, at 12.

While the above quoted statement is true with regards to the LBIA appellants, Vapor and Viad it is not true with regards to appellants RRFPC and ASI. As indicated, the appellees have filed claims against RRFPC and ASI stemming from exposure to asbestos containing brakes used on **both** locomotives and rail cars. In answering the third question in the affirmative this Court effectively dismissed

claims stemming from exposure to products used on locomotives. However, this Court's decision on the third question in no way impacted claims against RRFPC and ASI stemming from exposure to products used on rail cars, nor could it, as the LBIA applies only to locomotives.

* * * *

APPENDIX B — ORDER OF THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA DENYING PETITION FOR REHEARING DATED JANUARY 15, 2004

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of January 2004, the following order was made and entered:

In Re: West Virginia Asbestos Litigation

Civil Action No. 02-C-9004
Kanawha County Circuit Court

No. 31237

The Court, having maturely considered the petition for rehearing filed by the appellees, plaintiffs below, by Robert F. Daley, Mark T. Coulter, D. Aaron Rihn, Peirce Raimond & Coulter; and James F. Humphreys and David Cecil, their attorneys, on the 31st day of December, 2003, is of opinion to and doth hereby refuse said petition for rehearing. Justice McGraw and Judge Stone would grant.

A True Copy

Attest: s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX C — EXCERPTS FROM DEPARTMENT OF TRANSPORTATION POLICY STATEMENT

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[49 CFR Part 221]
[Docket No. ROS-1, Notice 3]

RAILROAD, OCCUPATIONAL SAFETY AND HEALTH STANDARDS; TERMINATION

Policy Statement

* * *

Policy Concerning Exercise of Statutory Authority

A. Introduction

. . . . Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations.

* * *

Appendix C

B. Exercise of FRA Jurisdiction Over Railroad Operations

* * *

. . . . While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.

* * *

Issued in Washington, D.C. on March 10, 1978.

John M. Sullivan,
Administrator.

APPENDIX D — REPORT TO CONGRESS OF THE U.S. DEPARTMENT OF TRANSPORTATION DATED SEPTEMBER 1996

U.S. Department of Transportation

Federal Railroad Administration

LOCOMOTIVE CRASHWORTHINESS AND CAB WORKING CONDITIONS

REPORT TO CONGRESS

Office of Safety Assurance and Compliance

September 1996

* * *

CHAPTER 10

Other Factors Affecting Locomotive Cab Working Conditions

FRA examined locomotive crew exposure to vibration and asbestos. Vibration can cause visual acuity problems and, when significant and/or combined with other factors, physiological effects. FRA conducted a review of open literature on the subject matter, and this chapter provides a summary of the findings.

* * *

Appendix D

The two primary locomotive manufacturers stopped using asbestos in their locomotives in the 1970's, and FRA has not identified sources of friable asbestos to which crew members could be exposed. Based on this fact and the small number of earlier vintage locomotives still in use, asbestos is not considered an issue.

In addition to the working conditions addressed in previous chapters, FRA also evaluated two other factors that are not currently covered in FRA regulations, but which can affect the working conditions aboard locomotives–vibration and asbestos. This chapter discusses the source of vibration and asbestos in current locomotives, the health and safety effects associated with their presence, and recommended actions to minimize or eliminate these effects on the performance of the locomotive crew.

* * *

OSHA: Final Asbestos Rules[14]

In the August 10, 1994 *Federal Register*, OSHA published final regulations to protect workers from exposure to asbestos. The rules, which cover four million workers and are estimated to cost $361.2 million annually, went into effect on October 11, 1994. This OSHA rule applies to railroad operating employees.

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14. Occupational Hazards, Sept 1994, OSHA: Final Asbestos Rule Covers 4 Million Workers.

Appendix D

At a press conference at OSHA headquarters, Assistant Secretary of Labor (OSHA), Joseph A. Dear said the rules will ensure effective long-term management of asbestos. OSHA has reduced the permissible exposure limit (PEL) from 0.2 fibers per cubic centimeter of air as an 8-hour time-weighted average to 0.1 fibers per cubic centimeter.

Asbestos in the Locomotive Cab

When steam generators were used on locomotives in passenger service, asbestos cement was used to insulate the heater coils to prevent loss of heat and contain the fire. Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs. This source of asbestos was eliminated in the 1970's, when the head end power system was developed for the heating of passenger trains with electricity.

GE and EMD, the two primary manufacturers of current locomotives, made the following statements regarding asbestos in their locomotives:

- GE[15] stated that asbestos has not been permitted in any facet of their locomotive production since October 1979. In addition, GE stated that there is no record of asbestos ever being used in the cab environment of its

15. Mr. R. Shults, Manager-Product & Environment Impact, General Electric Company (GE).

locomotives. Further, GE informed each of their outside suppliers in mid-1987 that all sub-assemblies provided for the production of locomotives must be free of asbestos.

- EMD[16] stated that of their 12 specifications for sound and thermal insulation applications, only one contained asbestos as a filler with a resin bonded fiberglass and only fiberglass was used as a loose insulating material. An EMD service bulletin was issued on April 6, 1984, prohibiting the use of asbestos for any purpose in locomotive construction. This restriction also is applied to outside contractors supplying sub-assemblies for the production of locomotives. In the 1970's, EMD began to curtail the use of asbestos in locomotive construction depending upon the location. EMD had identified 60 pages of part numbers which contained asbestos in some form in previous locomotive construction; however, these parts have been discontinued.

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16. Mr. Widdman, Electro Motive Division (EMD).

Appendix D

Conclusions

FRA has reviewed literature outlining the known health and safety effects of asbestos exposure, and contacted representatives from both primary locomotive manufacturers regarding the present and past use of asbestos in the construction of locomotives. While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment. The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time.